110-87

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~200.~~ 50

HORACE B. CLAFLIN, EDWARD E. EAMES, HORACE J. FAIRCHILD, WILLIAM S. DUNN, DEXTER N. FORCE, DANIEL ROBINSON, AND JOHN CLAFLIN, COPARTNERS AS H. B. CLAFLIN & CO., PLAINTIFFS IN ERROR,

vs.

THE COMMONWEALTH INSURANCE COMPANY OF BOSTON, MASSACHUSETTS.

No. ~~201.~~ 51

HORACE B. CLAFLIN, EDWARD E. EAMES, HORACE J. FAIRCHILD, WILLIAM S. DUNN, DEXTER N. FORCE, DANIEL ROBINSON, AND JOHN CLAFLIN, COPARTNERS AS H. B. CLAFLIN & CO., PLAINTIFFS IN ERROR,

vs.

THE WESTERN ASSURANCE COMPANY OF TORONTO, CANADA.

No. ~~202.~~ 52

HORACE B. CLAFLIN, EDWARD E. EAMES, HORACE J. FAIRCHILD, WILLIAM S. DUNN, DEXTER N. FORCE, DANIEL ROBINSON, AND JOHN CLAFLIN, COPARTNERS AS H. B. CLAFLIN & CO., PLAINTIFFS IN ERROR,

vs.

THE FRANKLIN INSURANCE COMPANY OF SAINT LOUIS, MISSOURI.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FILED SEPTEMBER 29, 1880.

SUPREME COURT OF THE UNITED STATES.

No. 290.

HORACE B. CLAFLIN, EDWARD E. EAMES, HORACE J. FAIRCHILD, WILLIAM S. DUNN, DEXTER N. FORCE, DANIEL ROBINSON, AND JOHN CLAFLIN, COPARTNERS AS H. B. CLAFLIN & CO., PLAINTIFFS IN ERROR,

vs.

THE COMMONWEALTH INSURANCE COMPANY OF BOSTON, MASSACHUSETTS.

No. 291.

HORACE B. CLAFLIN, EDWARD E. EAMES, HORACE J. FAIRCHILD, WILLIAM S. DUNN, DEXTER N. FORCE, DANIEL ROBINSON, AND JOHN CLAFLIN, COPARTNERS AS H. B. CLAFLIN & CO., PLAINTIFFS IN ERROR,

vs.

THE WESTERN ASSURANCE COMPANY OF TORONTO, CANADA.

No. 292.

HORACE B. CLAFLIN, EDWARD E. EAMES, HORACE J. FAIRCHILD, WILLIAM S. DUNN, DEXTER N. FORCE, DANIEL ROBINSON, AND JOHN CLAFLIN, COPARTNERS AS H. B. CLAFLIN & CO., PLAINTIFFS IN ERROR,

vs.

THE FRANKLIN INSURANCE COMPANY OF SAINT LOUIS, MISSOURI.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

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1 UNITED STATES OF AMERICA, *ss:*

To the Franklin Insurance Company of Saint Louis, Missouri:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, the first Monday in October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eighth circuit, district of Minnesota, wherein H. B. Claflin and Co. are plaintiffs and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Ransellear R. Nelson, judge of the district court of the United States, district of Minnesota, this ninth day of September, in the year of our Lord one thousand eight hundred and eighty.

R. R. NELSON,
Dist. Judge.

2 (Indorsed:) United States circuit court, eight' circuit, district of Minnesota. H. B. Claflin and Co., plaintiffs in error, vs. The Franklin Insurance Company of Saint Louis, Missouri, defendants in error. Citation.

Due service of the within citation is admitted this 9th day of September, A. D. 1880, and bond for costs waived.

YOUNG & NEWEL,
Att'ys for Def'ts, St. Paul, Minn.

3 UNITED STATES OF AMERICA, *ss:*

To the Western Assurance Company of Toronto, Canada:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, the first Monday in October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eight' circuit, district of Minnesota, wherein H. B. Claflin and Co. are plaintiffs and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Ransellear R. Nelson, judge of the district court of the United States, district of Minnesota, the ninth day of September, in the year of our Lord one thousand eight hundred and eighty.

R. R. NELSON,
Dist. Judge.

4 (Indorsed:) United States circuit court, eight' circuit, district of Minnesota. H. B. Claflin and Co., plaintiffs in error, vs. The Western Assurance Company, of Toronto, Canada, defendants in error. Citation.

Due service of the within citation is admitted the 9th day of September, A. D. 1880, and bond for costs waived.

YOUNG & NEWEL,
Att'ys for Def't, St. Paul, Minn.

5 UNITED STATES OF AMERICA, *ss:*

The Commonwealth Insurance Company of Boston, Massachusetts:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, the first Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eight' circuit, district of Minnesota, wherein H. B. Claflin and Co. are plaintiffs and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Ransellear R. Nelson, judge of the district court of the United States, district of Minnesota, this ninth day of September, in the year of our Lord one thousand eight hundred and eighty.

R. R. NELSON,
Dist. Judge.

6 (Indorsed:) The United States circuit court, eight' circuit, district of Minnesota. H. B. Claflin and Co., plaintiffs in error, vs. The Commonwealth Insurance Company of Boston, Massachusetts, defendant in error. Citation.

Due service of the within citation is admitted this 9th day of September, A. D. 1880, and bond for costs waived.

YOUNG & NEWEL,
Att'ys for Def't, St. Paul, Minn.

7 United States circuit court, district of Minnesota.

HORACE B. CLAFLIN ET AL.
vs.
COMMONWEALTH INS. CO. OF BOSTON, MASS.

SAME
vs.
WESTERN ASSURANCE CO. OF TORONTO, CANADA.

SAME
vs.
FRANKLIN INSURANCE CO. OF ST. LOUIS, MO.

To H. E. MANN, Esq., *Clerk:*

SIR: You are hereby requested to issue a writ of error from the Supreme Court of the United States to the judges of the circuit court for the district of Minnesota for the removal of the cases above entitled.

Dated Aug. 20, 1880.

JOHN B. & W. H. SANBORN,
Plaintiffs' Attorneys.

(Endorsed:) Filed Aug. 20, 1880. H. E. Mann, clerk.

8 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Minnesota, greeting:

Because in the record and proceedings, as also in the rendition of the

judgment of a plea which is in the said circuit court, before you or some of you, between Horace B. Claflin, Edward E. Eames, Horace J. Fairchild, William S. Dunn, Dexter N. Force, Daniel Robinson, and John Claflin, copartners as H. B. Claflin & Co, plaintiffs, and The Commonwealth Ins. Co. of Boston, Mass., defendant, a manifest error hath happened, to the great damage of the said plaintiffs as is said: We being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States at the Capital, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this twentieth day of August, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the United States the one hundred and fifth year.

[SEAL.] H. E. MANN,
Clerk of the Circuit Court of the United States of America for the District of Minnesota.

9 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Minnesota, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Horace B. Claflin, Edward E. Eames, Horace J. Fairchild, William S. Dunn, Dexter N. Force, Daniel Robinson, and John Claflin, copartners as H. B. Claflin & Co., plaintiffs, and The Western Assurance Company of Toronto, Canada, def't, a manifest error hath happened, to the great damage of the said plaintiffs as is said: We being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capital in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this twentieth day of August, in the year of

our Lord one thousand eight hundred and eighty, and of the Independence of the United States the one hundred and fifth year.

[SEAL.] H. E. MANN,
Clerk of the Circuit Court of the United States of America for the District of Minnesota.

10 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Minnesota, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between Horace B. Claflin, Edward E. Eames, Horace J. Fairchild, William S. Dunn, Dexter N. Force, Daniel Robinson, and John Claflin, copartners as H. B. Claflin & Co., plaintiffs, and The Franklin Insurance Co. of St. Louis, Mo., defendant, a manifest error hath happened, to the great damage of the said plaintiffs as is said: We being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capital in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this twentieth day of August, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the United States the one hundred and fifth year.

[SEAL.] H. E. MANN,
Clerk of the Circuit Court of the United States of America for the District of Minnesota.

11 UNITED STATES OF AMERICA,
District of Minnesota, ss:

The answer of the judges of the circuit court of the United States for the district of Minnesota, in the eighth circuit, in within writ mentioned.

The records and proceedings whereof mention is made in the three preceding writs of error, with all things concerning the same, are hereby respectfully certified to the justices of the Supreme Court of the United States of America therein mentioned as therein it is commanded in Schedule A hereto annexed, except that by direction of the counsel for the plaintiffs in error, and pursuant to the certificate of opposition of opinion of the judges, the pleadings in but one of the cases are certified, the others being similar except as to parties defendant and amounts, and where entries and orders were made in each case separately, which were alike except as to title, but one of such entries and orders are included.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Saint Paul, in the district of Minnesota, this second day of September, in the year of
12 our Lord one thousand eight hundred and eighty, and of the Independence of the United States the one hundred and fifth year.

[SEAL.] H. E. MANN,
Clerk U. S. Circuit Court, Dist. of Minnesota.

13 *Schedule A, referred to in foregoing certificate.*

14 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Minnesota, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Horace B. Claflin, Edward E. Eames, Horace J. Fairchild, William S. Dunn, Dexter N. Force, Daniel Robinson, and John Claflin, copartners as H. B. Claflin & Co., plaintiffs, and the Commonwealth Ins. Co. of Boston, Mass., defendant, a manifest error hath happened, to the great damage of the said plaintiffs, as is said: We being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this twentieth day of August, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the United States the one hundred and fifth year.

[U. S. CIRCUIT COURT SEAL.] H. E. MANN,
Clerk of the Circuit Court of the United States of America for the District of Minnesota.

(Indorsed:) U. S. circuit court, dist. of Minn. H. B. Claflin et al. vs. The Commonwealth Ins. Co. of Boston, Mass. Copy writ of error lodged in the office of the clerk of U. S. circuit court, dist. of Minnesota, by the plaintiffs in error for the defendant.

15 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Minnesota, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Horace B. Claflin, Edward E. Eames, Horace J. Fair-

child, William S. Dunn, Dexter N. Force, Daniel Robinson, and John Claflin, partners as H. B. Claflin & Co., plaintiffs, and the Franklin Ins. Company of St. Louis, Missouri, defendant, a manifest error hath happened, to the great damage of the said plaintiffs, as is said: We being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this twentieth day of August, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the United States the one hundred and fifth year.

[U. S. CIRCUIT COURT SEAL.] H. E. MANN,
Clerk of the Circuit Court of the United States of America for the District of Minnesota.

(Indorsed:) U. S. circuit court, dist. of Minn. H. B. Claflin et al. vs. Franklin Ins. Co. of St. Louis, Mo. Copy of writ of error lodged in the office of the clerk of the U. S. circuit court, dist. of Minnesota, by the plaintiffs in error for the defendant.

16 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Minnesota, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Horace B. Claflin, Edward E. Eames, Horace J. Fairchild, William S. Dunn, Dexter N. Force, Daniel Robinson, and John Claflin, copartners as H. B. Claflin & Co., plaintiffs, and the Western Assurance Company of Toronto, Canada, defendant, a manifest error hath happened, to the great damage of the said plaintiffs, as is said: We being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme

Court of the United States, this twentieth day of August, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the United States the one hundred and fifth year.

[U. S. CIRCUIT COURT SEAL.] H. E. MANN,
Clerk of the Circuit Court of the United States of America for the District of Minnesota.

(Indorsed:) U. S. circuit court, dis't of Minn. H. B. Claflin et al. vs. The Western Assurance Co. of Toronto, Canada. Copy of writ of error lodged in the office of the clerk of U. S. circuit court, dis't of Minnesota, by the plaintiffs in error for the defendant.

17 *Petition for transfer of suit to Federal court.*

State of Minnesota, district court, Ramsey County.

HORACE B. CLAFLIN, EDWARD E. EAMES, Horace J. Fairchild, William S. Dunn, Dexter N. Force, Daniel Robinson, and John Claflin, copartners as H. B. Claflin & Co., plaintiffs,
vs.
THE COMMONWEALTH INSURANCE COMPANY of Boston, Massachusetts, defendant.

To the honorable the district court:

Your petitioner, the above-named defendant, respectfully shows to this honorable court that the matter and amount in dispute in the above-entitled suit exceeds, exclusive of costs, the sum or value of five hundred dollars.

That the controversy in said suit is between citizens of different States, and that your petitioner was at the time of the commencement of this suit and still is a corporation, duly organized and existing under the laws of the State of Massachusetts, and a citizen of said State of Massachu-
18 setts, and that the plaintiffs and each and every of them were at the time of the commencement of this suit and now are citizens of the State of New York.

And your petitioner offers herewith a bond with good and sufficient surety for your petitioner's entering in the circuit court of the United States for the district of Minnesota on the first day of its next session a copy of the record in this suit, and for paying all cos's that may be awarded by said circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto.

And your petitioner prays this honorable court to proceed no further herein except to make the order of removal required by law, and to accept the said surety and bond and to cause the record herein to be removed into said circuit court of the United States in and for the district of Minnesota.

YOUNG & NEWEL,
Attorneys for Petitioner.

19 STATE OF MINNESOTA,
County of Ramsey, ss:

George B. Young, being duly sworn, says that he is a member of the

firm of Young & Newel, attorneys for the above-named petitioner in the above-entitled action, and is duly authorized to make and verify the foregoing petition, and that he verily believes the statements and allegations in said petition to be true.

GEO. B. YOUNG.

Subscribed and sworn to this 7th day of March, A. D. 1878, before me
[NOTARIAL SEAL.] R. B. GALUSHA,
Notary Public, Minn.

District court, Ramsey County.

H. B. CLAFLIN & CO.
vs.
THE COMMONWEALTH INSURANCE CO. OF BOSTON, Mass.

On reading and filing the petition of the defendant, and the bond with surety duly approved by this court, it is ordered that no further
20 proceedings be had by this court in this action, but that the same be, and hereby is, removed to the circuit court of the United States for the district of Minnesota.

Dated March 7th, 1878.

H. R. BRILL,
Judge of District C't.

(Endorsed:) Filed March 7th, 1878. A. R. Keifer, clerk, by Jas. O'Brien, deputy.

State of Minnesota, district court, Ramsey County.

HORACE B. CLAFLIN, EDWARD E. EAMES, Horace J. Fairchild, William S. Dunn, Dexter N. Force, Daniel Robinson, and John Claflin, copartners as H. B. Claflin & Co., plaintiffs,
vs.
THE COMMONWEALTH INSURANCE COMPANY of Boston, Massachusetts, defendant.

Know all men by these presents that I, George B. Young, as principal, and Lathrop E. Reed and James J. Hill, as sureties, all of the city
21 of Saint Paul, Minnesota, are held and firmly bound unto the above-named plaintiffs in the above-entitled action, copartners as H. B. Claflin & Co., in the sum of two hundred and fifty dollars, to be paid to the said obligees and plaintiffs' partners as aforesaid, their heirs and assigns, for which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated the 6th day of March, A. D. 1878.

Whereas the above-named The Commonwealth Insurance Company of Boston, Massachusetts, the defendant in the above-entitled action, has petitioned the said district court for Ramsey County, Minnesota, for a

removal of the said action now pending therein to the circuit court of the United States for the district of Minnesota:

Now, therefore, the condition of this obligation is such that if the said The Commonwealth Fire Insurance Company of Boston, Massachusetts shall enter into the said circuit court of the United States on the first day of its next session a copy of the record in said action
22 and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise to remain in force.

GEO. B. YOUNG. [SEAL.]
L. E. REED. [SEAL.]
JAS. J. HILL. [SEAL.]

Sealed and delivered in presence of—
R. B. GALUSHA.

STATE OF MINNESOTA,
County of Ramsey, ss:

On this seventh day of March, A. D. 1878, before me personally came George B. Young, Lathrop E. Reed, and James J. Hill, to me known to be the signers and sealers of the foregoing bond, and acknowledged the same to be their free act and deed.

[NOTARIAL SEAL.]

R. B. GALUSHA,
Notary Public Ramsey Co., Minn.

STATE OF MINNESOTA,
County of Ramsey:

Lathrop E. Reed and James J. Hill, being severally duly sworn,
23 each for himself deposes and says that he is a resident and freeholder of the State of Minnesota and is worth the sum of two hundred dollars over and above all his debts and liabilities and exclusive of property exempt from execution.

L. E. REED.
JAS. J. HILL.

Subscribed and sworn to this seventh day of March, A. D. 1878, before me.

[SEAL.]

R. B. GALUSHA,
Notary Public, Minn.

(Endorsed:) I approve the within bond and the sufficiency of the sureties.
March 7th, 1878.

H. R. BRILL,
Judge of District Court.

Filed March 7th, 1878. A. R. Kiefer, clerk, by Jas. O'Brien, dep'ty.

24 STATE OF MINNESOTA,
Ramsey County:

Second judicial district.

I, A. R. Kiefer, clerk of the district court, Ramsey County and State

of Minnesota, do hereby certify that I have compared the foregoing paper writing with the original petition, order, and bond for removal to U. S. circuit court in the action therein entitled, now remaining of record in my office, and that the same is a true and correct copy and transcript of said original and the whole thereof, and of the entire record and files of said action.

Witness my hand and seal of said court, at St. Paul, this 28th day of March, A. D. 1878.

[DISTRICT COURT SEAL.] A. R. KIEFER, *Clerk*,
By C. H. MANSHIP, *Deputy*.

(Indorsed:) No. 403. District court, Ramsey County. H. B. Claflin & Co., plaintiff, against Commonwealth Ins. Co. of Boston, Mass., defendant. Certified copy of return to circuit court. Filed Apr. 18, 1878. H. E. Mann, clerk, by James E. Wildey. Young and Newel, def't's attorneys.

25 *Summons.*

State of Minnesota, district court, second judicial district, county of Ramsey.

HORACE B. CLAFLIN, EDWARD E. EAMES, Horace J. Fairchild, William S. Dunn, Dexter N. Force, Daniel Robinson, and John Claflin, copartners as H. B. Claflin & Co., plaintiffs,
vs.
THE COMMONWEALTH INSURANCE COMPANY OF Boston, Massachusetts, defendant.

State of Minnesota to the above-named defendant:

You, said defendant, are hereby summoned and required to answer the complaint in this action, which is herewith served upon you, and to serve a copy of your answer to the said complaint on the subscribers at their office, in number 10 East Third street, in Saint Paul, Minnesota, within twenty days after the service of this summons upon you, exclusive of the day of such service; and if you fail to answer the said complaint
26 within the time aforesaid, the plaintiffs in this action will take judgment against you for the sum of nine hundred and eighty-three $\frac{73}{100}$ dollars, interest thereon at seven per cent. per annum from February 25, A. D. 1877, and the costs and disbursements of this action.

Dated February 11th, A. D. 1878.

JOHN B. & W. H. SANBORN,
Plaintiffs' Attorneys, St. Paul, Minn.

STATE OF MINNESOTA,
County of Ramsey, ss:

I certify and return that I have, on the 15th day of February, A. D. 1878, served the foregoing summons and attached complaint and verification on the defendant therein named, The Commonwealth Insurance Company of Boston, Massachusetts, by handing to and leaving with A. R. Mc-

Gill, insurance commissioner of the State of Minnesota, personally, in said Ramsey County, two true and correct copies thereof.

JOHN C. BECHT,
Sheriff of Ramsey County,
By MARION HARRISON, *Deputy.*

Fees $1.00.

27 *Complaint.*

State of Minnesota, county of Ramsey, district court, second judicial district.

HORACE B. CLAFLIN, EDWARD E. EAMES, Horace Fairchild, William S. Dunn, Dexter N. Force, Daniel Robinson, and John Claflin, copartners as H. B. Claflin & Co., plaintiffs,

vs.

THE COMMONWEALTH INSURANCE COMPANY of Boston, Massachusetts, defendant.

The plaintiffs, for a cause of action herein against the defendant, allege and aver:

That they are, and for more than one year last past have been, copartners, doing business under the firm name and style of H. B. Claflin & Co.

That during all the times hereinafter mentioned the defendant was, and still is, a corporation duly incorporated, organized, and doing business under and by virtue of the laws of the commonwealth of Massachusetts, and during all said time was, and now is, as such corporation, trans-
28 acting and doing its business of insuring against loss or damage by fire within the State of Minnesota, and under and by authority of of the laws of said State.

That on or about the 11th day of January, A. D. 1877, at Saint Paul, in the State of Minnesota, the defendant, in consideration of *siven* dollars to it then and there paid by one Frances E. Barritt, who was then the owner of the stock of goods hereinafter mentioned, and then situated in the store at No. 37 East Third street, in Saint Paul aforesaid, and who was then engaged in business as a merchant at Saint Paul aforesaid, did, by its certain policy of insurance by it duly executed and delivered to the said Frances E. Barritt, insure her to the amount of twenty-five hundred dollars against loss or damage by fire for the term of three months from said day on her stock of dry goods and other merchandize pertaining to her business then contained in the three-story stone, metal-roof building, situated No. 37 East Third street, in said Saint Paul, Minnesota, and in and by said policy, for the consideration aforesaid, the defendant did promise and agree to pay said loss or damage to said Frances E.
29 Barritt, her executors or assigns, not exceeding said sum, sixty days after due notice and proper proofs of the same were made to the defendant. That it was agreed in and by said policy that the said Frances E. Barritt was and should be allowed to insure said property in other companies to the amount of thirty thousand dollars.

That at the time of making said insurance, and from then until the assignment of said policy and sale of said stock, hereinafter mentioned, the said Frances E. Barritt had an interest in the property insured, as the owner thereof, to an amount exceeding the sum of thirty-five thousand dollars, and was the owner thereof.

That on or about the 10th day of February, A. D. 1877, with the consent of the defendant, which was duly given in writing on said policy by their agent, who was duly authorized so to do by the defendant, the said Frances E. Barritt, duly sold assigned, conveyed, and delivered to one William Murphy the said property hereinbefore described as insured by said policy, and the said policy of insurance and all her right, title, and interest in both the said property and said policy, and that from that
30 time until the fire hereinafter mentioned, and thereafter, said William Murphy had an interest in the property insured, as the owner thereof, to an amount exceeding the sum of thirty-five thousand dollars, and that he was during all such time the sole owner thereof.

That on or about the twenty-fifth day of February, A. D. 1877, the said building in which the said insured property was situated was partially burned, and the said property so insured was partially destroyed, and the balance, not utterly destroyed, but greatly damaged by fire.

That the actual cash value of said property at the time of the fire was thirty-five thousand four hundred and ninety-one $\frac{61}{100}$ dollars.

That the said property so insured was injured and damaged, and said Murphy, who was then the sole owner thereof, sustained a loss by said fire to the amount of twenty-five thousand dollars and more.

That said Murphy, immediately after said loss, gave notice thereof to the defendant, and as soon thereafter as possible, and more than
31 sixty days before the commencement of this action, rendered to said defendant a particular account of such loss, signed and sworn to by him, stating what other insurance had been made on said property, giving copies of the written portion of all policies thereon; also, the actual cash value of the property insured, the ownership thereof, the amount of loss or damage upon the same and each article thereof, and his interest therein; for what purpose and by whom the building containing the property insured and the several parts thereof were used, and by whom they were occupied at the time of the loss; when and how the fire originated; and did also produce a certificate, under the hand and seal of a notary public nearest to the place of the fire, and not concerned in the loss as a creditor or otherwise, nor related to the assured or sufferers, stating that he had examined the circumstances attending the fire, loss, and damage; knew the character and circumstances of the assured, and verily believed that said Murphy had, by misfortune and without fraud or evil practice, sustained loss on the property insured to the amount of
32 twenty-six thousand eight hundred and twenty-seven $\frac{06}{100}$ dollars.

That he did, more than sixty days before the commencement of this suit, submit to examination, at the request of the defendant, under oath, by a person appointed by said defendant, and subscribe to such examination, when reduced to writing, and did produce at such place as and whenever required by defendant his books of account and other vouchers, and exhibit the same for examination to and the same were examined by the defendant herein, and has always permitted all extracts and copies thereof, requested by said defendant, to be made.

That said William Murphy forthwith, after the said fire, caused the insured property aforesaid which had been damaged by said fire to be put in order, and did assort and arrange the various articles according to their kinds, and did separate the damaged from the undamaged, and did, more than sixty days before the commencement of this action, cause an inventory to be made and furnished to the defendant of the whole, naming the quantity, quality, and cost of each article.

33 That said Murphy thereupon requested the defendant to appoint mutually with him competent persons as appraisers to ascertain and determine the sound value of and damage to each article, in accordance with the provision of said policy, and did suggest, appoint, and name as such appraisers competent persons not interested in the loss as creditors or otherwise, nor related to the assured or sufferers, and used every reasonable endeavor to agree upon and to mutually, with said defendant, appoint such appraisers, but the defendant neglected and refused, and would not and did not agree upon or mutually with this plaintiff appoint such appraisers or any thereof.

And that this plaintiff fulfilled and performed all the conditions and stipulations and agreements relative to said insurance and loss by him to be fulfilled and performed according to the terms of said policy, more than sixty days before the commencement of this action.

That notice of said loss and damage by fire and due and proper proofs thereof, in accordance with the provision of said policy, were duly

34 made and given to said defendant by said Murphy on and prior to April 23d, A. D. 1877, and payment of the amount due him thereunder was by him there and often at other times duly demanded by said Murphy of said defendant.

That on or about the sixteenth day of October, A. D. 1877, the said William Murphy entered into and made an agreement to and with the said defendant, wherein and whereby it was agreed between said Murphy and said defendant that all differences between them touching the amount of the loss and damage, which arose from said fire, to the stock of goods of Murphy, should be, and that all the same were, submitted to William B. Dean, Reuben Warner, and Thomas Cochran, jr., arbitrators, and whereby it was agreed that the award of said men or any two of them should be taken and deemed to be a conclusive adjustment and determination of the amount of such loss and damage, and that the same should be conclusive evidence in any action against said defendant of the amount of said loss and damage.

35 That said Murphy and said defendant duly appeared before said arbitrators, who first took an oath to hear and determine the matters submitted to them according to the law and evidence, and thereupon duly heard and considered the allegations, evidence, and testimony of said William Murphy and of said defendant; and thereafter the said arbitrators made and duly submitted their award and findings, wherein and whereby they found, awarded, and determined that the amount of loss and damage by fire to the said stock of goods insured in said policy of insurance, and owned by said William Murphy, from the fire aforesaid, which occurred on or about February 25th, A. D. 1877, was eleven thousand and eight hundred and four $\frac{72}{100}$ dollars. The plaintiffs further aver that the said William Murphy used his best endeavors in saving and protecting the said property from damage at and after the fire.

That at the time of said fire there was insurance on said property, in companies other than the defendant, to the amount of twenty-five thousand dollars, and that the entire amount of insurance on the same
36 at that time was thirty thousand dollars, and no more.

That in and by the premises the defendant became justly indebted to the said William Murphy in the sum of nineteen hundred and sixty-seven $\frac{45}{100}$ dollars, and interest thereon from February 25th, A. D. 1877, payment of which has been often demanded, but nothing has ever been payed thereon.

That heretofore, and on or about the sixth day of December, A. D. 1877, the said William Murphy, for value received, duly sold, assigned, conveyed, and delivered to the plaintiffs all his claims and rights against the defendant for and on account of any loss or damage arising from said fire under said policy of insurance, and all other claims and rights against said defendant which he then had under or by virtue of said policy of insurance or otherwise, and that these plaintiffs are now the lawful owners thereof.

That the plaintiffs have demanded payment of the amount above named of this defendant, and no part thereof has ever been paid.

37 Wherefore the plaintiffs demand judgment against the defendant for the sum of nine hundred and eighty-three $\frac{73}{100}$ dollars, interest thereon from February 25th, A. D. 1877, and the costs and disbursements of this action.

Saint Paul, Feb. 11, 1878.

JOHN B. & W. H. SANBORN,
Plaintiffs' Attorneys.

STATE OF MINNESOTA,
County of Ramsey, ss:

Walter H. Sanborn, being duly sworn, says that he is one of the attorneys for plaintiffs in the above-entitled action; that the foregoing complaint is true, to the best of his knowledge, information, and belief, and that the reason why this affidavit of verification is not made by one of said plaintiffs is that they are all absent from the county of Ramsey, Minnesota, where resides this affiant, their attorney.

WALTER H. SANBORN.

Subscribed and sworn to before me this 12th day of February, A. D. 1878.

[NOTARIAL SEAL.] SAMUEL WHALEY,
Notary Public, Ramsey County, Minn.

38 (Indorsed:) State of Minnesota, county of Ramsey, district c't, second judicial district. H. B. Claflin & Co., plaintiffs, vs. The Commonwealth Ins. Co., defendant. Summons and complaint. Filed Jul' 26, 1880. H. E. Mann, clerk. John B. & W. H. Sanborn, plaintiffs' attorneys.

39 United States circuit court for the district of Minnesota. Term minutes, June term, A. D. 1878, June 26, 1878.

HORACE B. CLAFLIN ET AL.,
vs.
THE COMMONWEALTH INS. CO., BOSTON, MASSACHUSETTS.

On motion of defendant, ordered that the defendant have leave to file an amended answer.

40 U. S. circuit court, dist. of Minnesota.

HORACE B. CLAFLIN AND EDWARD E. EAMES, Horace J. Fairchild, William S. Dunn, Dexter N. Force, Daniel Robinson, and John Claflin, copartners as H. B. Claflin & Co., plaintiffs,
vs.
THE COMMONWEALTH INSURANCE COMPANY OF Boston, Mass., defendant.

I. The defendant, for amended answer to the complaint, denies each and every allegation thereof except such as are hereinafter expressly admitted, and admits the partnership of the plaintiffs, and that the defendant is a corporation insuring against loss or damage by fire, as alleged in the complaint.

II. Further answering, and for a second defense, the defendant admits that on or about January 11, 1877, it did execute and deliver a certain instrument, in form a policy of insurance, and purporting to insure
41 one Frances E. Barritt against loss or damage by fire on her stock of goods in the building known as No. 37 East 3rd street, in Saint Paul, for the term and in the amount mentioned in the complaint. But the defendant denies that the said F. E. Barritt then or at any time was the owner of said stock of goods, or of any part thereof, or that she ever had any insurable or other interest therein, or in any part thereof.

And the defendant says that the said instrument was procured to be issued by and was issued and delivered to one John J. Johnston, who was then in possession of said stock in said building; and that at and prior to the issuing to him of said instrument the said Johnston did, for the purpose of obtaining the same, and for the purpose of cheating and defrauding the defendant, and of procuring insurance on said stock in excess of its value, and of collecting such excessive and over insurance from the defendant and other companies issuing policies thereon, fraudulently state and represent to the defendant that the said stock was of the value of $60,000,
42 whereas, in truth and in fact, the said stock was not then or at any time of any greater value than $20,000, as the said Johnston then and there well knew; and that the said instrument was issued by the defendant and delivered to said Johnston in reliance on said statements and representations and in belief that the same were true, and in belief that the said Frances E. Barritt was the owner of said stock; and the defendant says that in and by said policy it is expressly provided that in case of any overvaluation or misrepresentation whatever, either in a written applica-

tion or otherwise, or if the interest of the assured should not be truly stated in said policy, then and in every such case such policy should be void.

III. Further answering, and for a third defense, the defendant admits that the said Francis E. Barritt did heretofore, and on or about February 9, 1877, assign and transfer to William Murphy the said policy and all her interest therein, and that the defendant did in writing consent to such assignment, but the defendant says that at the same time of the said assignment and consent the defendant believed the aforesaid representations of said Johnston, and had not discovered their falsity or the
43 fraudulent purpose of said Johnston, nor had the defendant learned that said Barritt had no interest in said stock, and the defendant says that said Murphy received said assignment well knowing the false and fraudulent representations made as aforesaid by said Johnston, and well knowing that the said policy had been issued on the faith thereof, and that the same were false and fraudulent.

Further answering, the defendant denies that the said Frances E. Barritt ever assigned, conveyed, or delivered the said stock of goods, or any part thereof, or any part of the property mentioned in said policy to William Murphy, or that the defendant ever gave its consent to any such assignment, or that the said Murphy ever acquired or had any insurable or other interest in said stock of goods or property.

And the defendant says that on or about February 10th, 187 , the said Johnston, in pursuance of his said purpose of defrauding the defendant, and of defrauding certain other insurance companies who had issued to the said F. E. Barritt policies of insurance against fire on said stock of goods,
44 did, in the name of said F. E. Barritt, make a sham and pretended sale of said stock to said William Murphy, but that said pretended sale was wholly without consideration, and passed no title to or interest in any of said goods to said Murphy, and the same was merely colorable and was made for the sole purpose of holding out said Murphy as the ostensible owner, in order that the said Johnston might thereby the better carry out, in the name of said Murphy, his said fraudulent purpose of collecting from the defendant and said other insurance companies an amount of insurance far in excess of the value of said goods.

And the defendant says that, by reason of the matters aforesaid, and each of them, the said policy hath ever been wholly void.

IV. Further answering, and for a fourth defense, the defendant admits that, on February 25, 1877, a part of said stock was destroyed and another part damaged by and in consequence of a fire in said building; but the defendant says that the total amount of said loss and damage did not exceed the sum of five thousand dollars, and the defendant denies that the said Murphy sustained any loss or damage whatever by reason of said fire.

45 V. Further answering, and for a fifth defense, the defendant says that in and by said policy it was provided that the same was made and accepted upon certain terms and conditions therein expressed, and that the said Murphy hath wholly failed to keep and perform the conditions and provisions of said policy by him to be kept and performed, in this, to wit:

1. That in and by said policy it is provided that if the interest of the

assured in the property insured be any other than the entire, unconditional, and sole ownership of the property for the use and benefit of the assured, the same must be so represented to the company, and expressed in the written portion of said policy, and that otherwise the said policy should be void, and the defendant says that neither said Barritt nor Murphy was at any time the entire, unconditional, and sole owner of said property for her or his own use and benefit, but that such fact was not so represented to the defendant nor expressed in the written portion of said policy, or the assignment thereof.

2. That in and by said policy it is provided that the best endeavors
46 of the assured shall be used in saving and protecting the property from damage at and after the fire, and that in case of his failure to do so the defendant should not be liable for damages caused by such failure; and the defendant says that the said Murphy did not use his best or any efforts to save or protect said property, and that all the damage to such of said goods as were damaged and not destroyed, in excess of three thousand dollars, was caused by the failure of the said Murphy to perform said condition.

3. That in and by said policy it is provided that persons sustaining loss or damage by fire shall forthwith give notice of such loss to the company, and as soon thereafter as possible render a particular account of such loss, signed and sworn to by them, stating the cash value of the property, and their interest therein, when and how the fire originated; and that the assured shall, if required, submit to an examination under oath by any person appointed by the company, and shall subscribe the same when reduced to writing, and shall produce their books of account and other
47 vouchers, and exhibit the same for examination at the office of the company, and permit extracts and copies thereof to be made; and that the assured shall produce certified copies of all bills and invoices thes originals of which have been lost; and that until such proofs and declarations are produced, and such appraisals and examinations are permitted by the claimant, the proofs shall not be considered sufficient nor the loss collectible; and that when personal property is damaged the assured shall forthwith cause it to be put in order, assorting and arranging the various articles according to their kinds, separating the damaged from the undamaged, and shall cause an inventory to be made and furnished to the company of the whole, naming the quantity, quality, and cost of each article; and that the amount of each article shall be obtained by appraisal of each article by competent persons (not interested in the loss as creditors or otherwise, nor related to the assured or sufferers) to be mutually appointed by the assured and the company, their report, in writing, to be made under oath before any magistrate or other properly commissioned person;
48 and that until such proofs, declarations, and certificates are produced and examinations and appraisals permitted by the claimant, the loss shall not be payable; and that if the interest of the assured be less than the entire and sole ownership, the names of the respective owners shall be set forth, together with their respective interests therein; and that all fraud or attempt at fraud by false swearing or otherwise shall cause a forfeiture of all claim upon this company under this policy.

And the defendant says that said Murphy has not, at any time, kept

or performed the said conditions, or any of them, but has failed to keep and perform the same in this, that the said Murphy did never make due proofs of loss, in accordance with said policy, nor did he ever render to the defendant a particular account of the loss claimed to have been sustained by him, as required by said condition, nor produce his books of account, or invoices, or vouchers, or certified copies of any bills or invoices, except a certain book containing a false and pretended in-
49 ventory of said stock, bearing date January 20, 1877, the prices in which inventory were wholly false and fictitious, as said Murphy well knew, and which inventory was not a true inventory of said stock.

And that said Murphy did not, after the said fire, cause the personal property damaged thereby (and which is the same property mentioned in said complaint), nor any part thereof, to be put in order, or assort or arrange the various articles, or any of them, according to their kinds, or separate the damaged from the undamaged, or cause to be made or furnish to the defendant any inventory naming the quantity, quality, and cost of each article; but that upon the neglect and refusal of said Murphy and his agents so to do, the defendant and said other companies did cause the same to be so put in order, assorted, arranged, and separated, the damaged from the undamaged; and that thereupon the said Murphy and the said Johnston did willfully, and for the purpose of concealing the true amount of damage, and of increasing the actual, and still more the appar-
50 ent, damage, and thereby defrauding the defendant and said other insurance companies, mix the said goods together again, the damaged with the undamaged, the wet with the dry, mingling all kinds and qualities together.

And that said Murphy did at all times refuse to have the amount of sound value and damage ascertained by appraisal of each article by competent persons, as provided in said condition, although the defendant was ever ready and willing, and did offer to perform said condition and did often request the said Murphy so to do.

And that said Murphy, in certain papers furnished by him to the defendant in support of his claim under the said policy, and as and for the proofs of loss thereby required, did state under oath that the actual cash value of the property insured in said policy at the time immediately preceding said fire amounted to $35,491.61, and that the same belonged to him, the said Murphy; and that the property insured was injured to the amount of $26,827.06, and that of said amount $6,463.39 was the cost and value of the goods totally destroyed, and the sum of $20,360.67
51 was the amount of loss on that part of said stock which was damaged but not destroyed; whereas in truth and in fact the cash value of said goods immediately preceding said fire did not exceed $18,000, and the total amount of loss and damage thereto by said fire did not exceed $5,000, and the said goods so damaged or destroyed did not belong to said Murphy, as he, the said Murphy, then well knew.

That after said fire, and on or about March 3rd, 1877, and while H. C. Alverson and H. M. Russell were engaged in attempting to adjust the amount of said loss as agents for the defendant and said other companies, the said Johnston, with the knowledge, connivance, and consent of said Murphy, and for the purpose of defrauding said companies, did attempt, by bribery, to procure the said adjusters, and each of them, to con-

sent to an excessive, false, and fraudulent adjustment of said loss at the sum of $25,000, and did pay the said Russell the sum of $260, and did promise to pay him the further sum of $1,250 upon the completion of
52 said fraudulent adjustment, and did pay the said Alverson $250, and did promise to pay him the further sum of $250, upon the completion of such false and fraudulent adjustment.

That thereafter the said Murphy was examined under oath, at the city of St. Paul, by an agent of the defendant, as provided in said policy, before J. D. O'Brien, esq., and before R. B. Galusha, esq., who were then and there respectively notaries public within and for the county of Ramsey, and in such examination the said Murphy did swear that he had purchased said stock from said Barritt, and that he was the sole owner thereof, and that no other person had any interest therein, and that he had fully paid for the same, each and every of which statements as to said purchase, ownership, interest, payment, and the manner thereof, were wholly false, as said Murphy well knew.

And the defendant says that by reason of the frauds and attempts at fraud aforesaid, and the false swearing aforesaid, and because of his failure to perform the said conditions, and each of them, the said Mur-
53 phy never had any cause of action against this defendant upon said policy.

The defendant admits that at the time of said fire there was insurance on said stock to the amount of $30,000, and admits the arbitration and award mentioned in folios 18 to 21 of the complaint.

VI. For a sixth defense, the defendant says that as to whether said Murphy ever made any assignment to plaintiffs of any claim against the defendant, the defendant has no knowledge or information sufficient to form a belief.

VII. Further answering, and for a seventh defense, the defendant says that the said fire was willfully and purposely set and caused to be set by said Johnston and said Murphy, in execution of said scheme of defrauding the defendant and said other insurance companies, and for the purpose of defrauding them and each of them.

Wherefore the defendant prays judgment for costs.

YOUNG AND NEWEL,
Attorneys for Defendants, St. Paul, Minn.

54 DISTRICT OF MINNESOTA:

George B. Young, being duly sworn, says that he is a member of the law firm of Young and Newel, attorneys for the defendant in the above-entitled action; that the foregoing amended answer is true to the best of his knowledge, information, and belief, and that the defendant, and each and every of its officers, is absent from the State of Minnesota, and from the county of Ramsey, in said State, where resid's this affiant, one of their said attorneys.

GEO. B. YOUNG.

Subscribed and sworn to this 26th day of June, A. D. 1878, before me.
H. E. MANN, *Clerk.*

55 (Indorsed:) U. S. circuit court, dist. of Minnesota. Horace B. Claflin, Edward E. Eames, Horace J. Fairchild, William S.

Dunn, Dexter N. Force, Daniel Robinson, and John Claflin, copartners as H. B. Claflin & Co., plaintiffs, vs. The Commonwealth Insurance Co., defendant. Amended answer. Filed June 26, 1878. H. E. Mann, clerk. Young & Newel, attorneys for defendant.

56 United States circuit court for the district of Minnesota. Term minutes, June term, A. D. 1878. June 27, 1878.

HORACE B. CLAFLIN ET AL.
vs.
THE COMMONWEALTH INSURANCE COMPANY of Boston, Mass.

The parties consenting thereto, it is ordered that this cause do stand continued until the next term of this court.

57 United States circuit court for the district of Minnesota. Term minutes, June term, A. D. 1879. July 8, 1879.

HORACE B. CLAFLIN ET AL.
vs.
THE COMMONWEALTH INSURANCE COMPANY of Boston, Mass.

AND

HORACE B. CLAFLIN ET AL.
vs.
THE FRANKLIN INSURANCE COMPANY OF ST. Louis, Mo.,

AND

HORACE B. CLAFLIN ET AL.
vs.
THE WESTERN ASSURANCE COMPANY OF Toronto, Canada.

The three foregoing and above-entitled causes coming on to be tried, the parties appeared by their respective attorneys, Mess. John B. & W. H. Sanborn for the plaintiffs, and Geo. B. Young, esq., and C. B. O'Brien, esq., for the defendants, when the following announcement and order was made by the court, to wit:

The cases involve the same issues, as will be seen by the pleadings. The court has heretofore tried two cases brought by the plaintiffs relating to the same loss, and is apprised that the testimony in each is substan-
58 tially the same; the parties are represented by the same attorneys.

The issues are simple, but the witnesses are numerous and the costs great, and separate trials for want of time are impracticable at this term. Counsel have not been able to offer any special reason why the three cases should not be tried to the same jury in the manner provided for in the order following:

Upon consideration of these circumstances and of the powers given to the court by the act of July 22, 1813 (3d Stat. at Large, 19, sec. 30; sec. 921, Rev. Stat.), to make orders to prevent costs and delay and of the practice of courts in such cases (see Hollingworth vs. Broderick, 31 Eng. C. L., 162; Lewis vs. Barker, 93 Id., 329; Viele vs. Ins. Co., 26 Iowa, 9, 45; McGregor vs. Hoosfall, 3 M. & W., 320; Conklin's Treatise, 3d ed., 383) the court—the defendants not objecting, the plaintiffs objecting—orders that the three cases above entitled be tried at the same time to the same jury, who shall be duly sworn in each case, but the jury shall be directed separately to consider each the same as though it was alone to be tried, and return
59 separate verdicts in each, the court reserving the right on its own motion, or upon cause shown after the testimony is all produced, to withdraw from the jury all of the cases but one, if in its judgment it will prejudice either party to have them all submitted to the jury at the same time.

Pursuant to the foregoing order a jury was called, who came, to wit: Wm. A. Cole, Wm. Gillett, A. J. Lamberton, O. F. Peck, H. O. Nickenson, Chas. Kayser, J. F. Wright, Z. B. Page, N. C. Gault, Joseph Covert, J. L. Thorne, J. A. Wilson, who are duly impaneled and sworn in each of the three above-entitled cases well and truly to try each and a true verdict to give in each according to the evidence.

John B. Sanborn, esq., opens the case for the plaintiffs.

B. L. Barrett is sworn and examined as a witness for the plaintiffs.

I. V. Heard " " " " " " " " "

Murphy " " " " " " " " "

And here the plaintiffs rest their cases.

Geo. B. Young, esq., opens the cases for the defendants.

60 United States circuit court for the district of Minnesota. Term minutes, June term, A. D. 1879, July 9, 1879.

HORACE B. CLAFLIN ET AL.
vs.
THE COMMONWEALTH INSURANCE COMPANY OF Boston, Massachusetts.

AND

HORACE CLAFLIN ET AL.
vs.
THE FRANKLIN INSURANCE COMPANY OF ST. Louis, Missouri.

AND

HORACE B. CLAFLIN ET AL.
vs.
THE WESTERN ASSURANCE COMPANY OF Toronto, Canada.

These causes coming on to be further tried, the parties thereto appeared by their respective attorneys, and the jury heretofore impaneled and sworn therein being called came also.

J. J. Watson is sworn and examined as a witness for defendants.
J. R. King " " " " " " " " "

A. J. Lamberton, one of the jurors on the panel in these cases asked to be excused on account of sickness in his family, and it appearing reasonable and proper that he should be, all of the jurors impaneled
61 in these cases were excused until Friday morning, July 11, 1879, at 10 o'clock, and the further trial of these cases was postponed until that time.

62 United States circuit court, district of Minnesota. Term minutes, June term, A. D. 1879, July 11, 1879.

HORACE B. CLAFLIN ET AL.
vs.
THE COMMONWEALTH INSURANCE COMPANY of Boston, Mass.

AND

HORACE B. CLAFLIN ET AL.
vs.
THE FRANKLIN INSURANCE COMPANY OF ST. Louis, Missouri.

AND

HORACE B. CLAFLIN ET AL.
vs.
THE WESTERN ASSURANCE COMPANY OF Toronto, Canada.

These causes coming up for further trial, the parties thereto appeared by their respective attorneys, and the jury heretofore impaneled and sworn herein being called all came but the said A. J. Lamberton, and it appearing that he, the said Lamberton, could not be present until Monday next, it is ordered that the jury be discharged from the further consideration of these cases, and that the said cases do stand continued until the next term of this court.

63 United States circuit court, district of Minnesota. Term minutes, December term, A. D. 1879, December 24, 1879.

HORACE B. CLAFLIN ET AL.
vs.
THE COMMONWEALTH INSURANCE COMPANY of Boston, Mass.

And now it is by the court ordered that this cause do stand continued until the next term of this court.

64 United States circuit court for the district of Minnesota. Term minutes, June term, A. D. 1880, June 23, 1880.

HORACE B. CLAFLIN ET AL. *vs.* THE COMMONWEALTH INS. CO. OF BOSTON, Mass.	Before Judges Miller & Nelson.

This cause being reached on the calendar and called, the plaintiff appeared by Messrs. John B. & W. H. & W. H. Sanborn, and the defendant by Messrs. Young & Newel and Messrs. Davis, O'Brien & Wilson, and a jury being called, pending the impaneling of the jury, the court adjourned.

65 United States circuit court for the district of Minnesota. Term minutes, June term, A. D. 1880. June 24, 1880.

HORACE B. CLAFLIN ET AL. *vs.* THE COMMONWEALTH INSURANCE COMPANY OF Boston, Mass.	Before Judges Miller & Nelson.

This cause coming on for further trial, the parties appeared by their said attorneys, and the jury called came, to wit: David H. Orr, John L. Thorne, H. O. Bassford, Josiah Town, H. C. Van Leuven, J. C. Taberer, C. W. Graham, L. R. Palmer, James M. Cole, Edward H. Judson, William Nettleton, Chas. B. Yale, who are duly impaneled and sworn.

J. B. Sanborn, esq., opens the case for the plaintiff.

Wm. Johnson is sworn and examined as a witness for plaintiffs, and here the plaintiffs rest their case.

Geo. B. Young, esq., opens the case for the defendant.

J. R. King is sworn and examined as a witness for defendant.

John J. Watson " " " " " " "

66 United States circuit court for the district of Minnesota. Term minutes, June term, A. D. 1880. June 25, 1880.

HORACE B. CLAFLIN ET AL. *vs.* THE COMMONWEALTH INSURANCE CO. OF Boston, Mass.	Before Judges Miller & Nelson.

This cause coming on for further trial, the parties appeared by their said attorneys, and the jury heretofore impaneled herein being called, came also.

R. A. Durke is sworn and examined as a witness for defendant.
Wm. F. Mason " " " " " " " "
J. W. Warren " " " " " " " "
Wm. Lee " " " " " " " "
Merrill Ryder " " " " " " " "
R. O. Strong " " " " " " " "
Wm. M. Brackett " " " " " " " "
P. R. Gibbons " " " " " " " "
I. V. D. Heard " " " " " " " "

67 United States circuit court for the district of Minnesota. Term minutes, June term, A. D. 1880. June 26, 1880.

HORACE B. CLAFLIN ET AL.
vs.
THE COMMONWEALTH INSURANCE COMPANY of Boston, Mass.
} Before Judges Miller & Nelson.

This cause coming on for further hearing, the parties appeared by their said attorneys, and the jury heretofore impaneled and sworn herein being called, came also.

Documentary evidence produced and offered in evidence by defendant.
Henry Schurmeier is sworn and examined as a witness for defendant.
H. M. Russell is sworn and examined as a witness for defendant.
H. C. Alverson " " " " " " " "
And here the defendant rests its case.

68 United States circuit court for the district of Minnesota. Term minutes, June term, A. D. 1880. June 28, 1880.

HORACE B. CLAFLIN ET AL.
vs.
THE COMMONWEALTH INSURANCE COMPANY of Boston, Mass.
} Before Judges Miller & Nelson.

This cause coming on for further trial, the parties appeared by their said attorneys, and the jury heretofore impaneled and sworn being called, came also.

William Murphy, a witness for plaintiffs, is sworn and examined.
Richard H. Stevens " " " " " " "
Mrs. F. E. Barritt " " " " " " "
J. J. Johnston " " " " is recalled and further examined for plaintiff.

69 United States circuit court for the district of Minnesota. Term minutes, June term. A. D. 1880. June 29, 1880.

HORACE B. CLAFLIN ET AL.
vs.
THE COMMONWEALTH INS. CO. OF BOSTON, MASS.
} Before Judges Miller & Nelson.

This cause coming on for further trial, the parties appeared by their said attorneys, and the jury heretofore impaneled and sworn herein being called, came also.

Reuben Warner is sworn and examined as a witness for plaintiff.
A. J. Powers " " " " " " " "
Jacob Manheimer " " " " " " " "
J. H. Thompson " " " " " " " "
Nelson Fiske " " " " " " " "
John Leystedt " " " " " " " "
And here the plaintiffs rest.
H. M. Russell is recalled and further examined as a witness for def't.
H. C. Alverson " " " " " " " "

Defendant rests.
C. K. Davis submits and argues legal propositions to the court for defendant.
Walter H. Sanborn " " " " " " "
C. K. Davis, esq., sums up the case for the defendant.
John B. Sanborn, esq., " " " " " " "

70 United States circuit court for the district of Minnesota. Term minutes, June term, A. D. 1880, June 30, 1880.

HORACE B. CLAFLIN ET AL.
vs.
THE COMMONWEALTH INSURANCE CO. OF BOSTON, Mass.
Before Judges Miller & Nelson.

This cause coming on to be further tried, the parties appeared by their said attorneys, and the jury heretofore impaneled and sworn herein being called, came also. Charge is given the jury by the court, and they retire in charge of an officer duly sworn and qualified to attend them, to consider of their verdict, and on being returned into court they say they find a verdict for the defendant; whereupon the plaintiffs gave notice of a motion for a new trial, and on their motion the court granted a stay of proceedings for 20 days or until its further order.

71 United States circuit court for the district of Minnesota. Term minutes, June term, A. D. 1880, July 2, 1880.

HORACE B. CLAFLIN ET AL.
vs.
THE COMMONWEALTH INS. CO. OF BOSTON, Massachusetts.
Before Judges Miller & Nelson.

The motion of the plaintiffs to set aside the verdict rendered by the jury herein, and for a new trial coming on for hearing, was argued on the part of the plaintiffs by John B. Sanborn, esq., and on the part of the defendant by O. K. Davis, esq., and submitted and by the court taken under advisement.

72 United States circuit court for the district of Minnesota. Term minutes, June term, A. D. 1880, July 5, 1880.

HORACE B. CLAFLIN ET AL.
vs.
THE COMMONWEALTH INSURANCE COMPANY OF Boston, Mass.
Before Judges Miller & Nelson.

A motion for a new trial in this cause having been heretofore argued and submitted, and by the court taken under advisement: Now, the court being fully advised in the premises, it is ordered that the said motion be, and the same is hereby, overruled.

Whereupon it is by the court considered, ordered, and adjudged that the plaintiffs take nothing by their suit, and that the defendant go hence

without day, and that it recover of and from the plaintiffs its costs to be taxed, and that execution issue therefor.

73 United States circuit court, dist. of Minnesota. Term minutes, June term, A. D. 1880, July 5, 1880.

HORACE B. CLAFLIN & CO., PL'FFS,
vs.
THE COMMONWEALTH INSURANCE COMPANY OF Boston, Mass., The Franklin Insurance Company of St. Louis, Missouri, and The Western Assurance Company of Toronto, Canada, def'ts.

These causes having been duly ordered to be tried before the same jury by the court came on for trial before the Hon. Samuel F. Miller and the Hon. Renssalaer R. Nelson, judges of said court, presiding at said trial, at a general term thereof begun and held at St. Paul, Minnesota, on the third Monday in June, A. D. 1880.

The respective causes were brought by the plaintiffs on certain policies of insurance bearing date as follows: That of The Commonwealth Insurance Company of Boston bearing date of 11th of January, 1877; that of The Western Assurance Company of Toronto, Canada, bearing
74 date of 27th of December, 1876; and that of The Franklin Insurance Company of St. Louis bearing date of 29th of December, 1876, the two latter being for $5,000 each, and the former for $2,500, insuring one Frances E. Barritt against loss or damage by fire on her stock of dry goods or other merchandize pertaining to her business, contained in the three-storied store, metal-roofed building, situated No. 37 East 3rd street, St. Paul, Minnesota, for a period of three months after their respective dates, with the condition that $35,000 other insurance shall be allowed. The respective policies were assigned by Frances E. Barritt, the assured, to one William Murphy on the 7th day of February, 1877, with the consent and approval of the respective companies.

On the 25th day of February, 1877, said stock of goods was damagep by fire to the amount of $11,804.72, as found and determined by the arbitrators appointed by the assured and the respective companies. The policy of The Western Assurance Company of Toronto, Canada, contained, among other things, the following provision: "The assured shall, if
75 required, submit to an examination or examinations under oath by any person appointed by the company, and subscribe thereto when the same is reduced to writing," and also "all fraud or attempt at fraud, by false swearing or otherwise, shall forfeit all claim on this company, and be a perpetual bar to any recovery under this policy."

That of the Franklin Insurance Company of St. Louis contained, among others, the following provision, viz: "And the insured shall, if required, submit to an examination under oath, by the agent or attorney of this company, and answer all questions touching his, her, or their knowledge of anything relating to such loss or damage, or to their claim thereupon, and subscribe such examination, the same being reduced to writing;" and the further provision, to wit, "All fraud or false swearing shall cause a forfeiture of all claims on the insurers, and shall be a full bar to all remedies against the insurer on the policy;" that of the defendant. The Com-

monwealth Insurance Company of Boston contained, among others,
76 the following provision, to wit, "All fraud or attempt at fraud, by false swearing or otherwise, shall cause a forfeiture of all claims on this company under this policy;" and the further provision, viz: "The assured shall, if required, submit to an examination or examinations, under oath, by any person appointed by the company, and subscribe to such examinations when reduced to writing."

Upon the trial of said causes there was evidence tending to show that the respective defendants required the assured, William Murphy, to appear before their appointed agent and submit to an examination under oath, and answer all questions touching his knowledge of anything relating to such loss or damage and his claim thereupon, and to subscribe such examination, the same being reduced to writing, which the said Muphy did, as required, and that upon said examination the question of the ownership of said goods by said Murphy was made by the defendants, and said Murphy examined at length upon the same, and he answered certain questions relating to the manner in which he paid one Frances E. Barritt for said stock at the time of his alleged purchase thereof falsely, and there was evidence tending to show that he answered thus with no purpose to deceive and defraud the insurance companies, but
77 for the purpose of showing himself, upon the examination, consistant with a statement that he had make about it a day or two subsequent to the purchase of said stock to R. G. Dunn & Co.'s commercial agency at St. Paul, Minnesota, with a view of obtaining a large commercial credit in Eastern cities. There was evidence tending to show that on the 9th day of February, 1877, said William Murphy went to said agency and reported that he had bought the stock of Frances E. Barritt for $35,484.20; that he had paid for the same in cash and securities, and plaintiffs claimed that if the false statements were made to the agents of the insurance company upon examination, even though made upon a material question without interest to deceive or defraud the insurance companies, it would not prevent a recovery upon the policies, and requested the court upon that point to charge as follows: "If you find from the evidence that any incorrect statements made by William Murphy upon his examination were made for the purpose of protecting himself against the statements made by him to the commercial agency for the purpose of obtaining more credit than he was actually entitled to, and not for the purpose of deceiv-
78 ing and defrauding the defendants, then such statements constitute no defence to this action," and also, "No false statements made by Murphy on his examination, under oath or otherwise, constitute a defence to this action, unless the same were made upon material issues between him and the defendants, and unless you are satisfied from the evidence that Mr. Murphy made them knowingly and willfully, with intent thereby to deceive and defraud the defendants."

The court (his honor Judge Miller addressing the jury) refused to give said instructions, but told the jury in its charge that the said questions relating to the manner in which Mr. Murphy paid said Frances E. Barritt for said stock at the time of his alleged purchase thereof were upon a material point, upon which the defendants had a right to interrogate Mr. Murphy, and were material questions, to which they had a right to true

answers from Murphy in said examinations, and upon the point in controversy upon which the said instructions were asked charged the jury as follows, to wit: "It is said here, and the point is urged with a good deal
of force, that unless Mr. Murphy made these false statements, if
79 they were false, and it is conceded that they were false, with the intent to deceive and defraud these corporations, and if he made them with the intent to deceive and defraud some one else, that it is immaterial to this issue. I don't think that is the law. I don't think it was necessary in order to avoid the policy that the statements made by Mr. Murphy should have been solely, or even partly, with a view to get money wrongfully out of the companies; however, that is a point I wish to draw your attention to. If these statements had been wholly immaterial, that doctrine may be right; if it was a matter that the company had no right to enquire into or interrogate him about, if he did swear falsely and intend to deceive some one else, that does not interfere with the policy; but these companies had a right to have from him the truth about every matter that was material as evidence to show whether he owned these goods or not; they had a right to have the truth from him whatever his intentions might have been; that is, as far as the truth was material; and so far as his testimony before the notary had a tendency to mislead the companies on an
80 important matter, it was false swearing and false testimony within the meaning of the policy, and would avoid the policy. If he stated that which was intended for their action, and which would probably influence their action, and these statements were false, then he swore falsely within the meaning of the policy, though he didn't intend to cheat them, but intended to cheat somebody else, for, without looking to his motives, the company had a right to an honest statement from him to all questions that went to show whether he was the owner of these goods or not."

To which refusals to charge as requested, and to said charge as given plaintiffs' counsel thereupon duly excepted, and after the rendition of the verdict for the defendants moved for a new trial on account thereof, and said motion was duly argued by John B. Sanborn, esq., counsel for the plaintiff, and Cushman K. Davis, esq., counsel for the defendant, and after due consideration thereof the court denied the motion, and upon the question as to whether said instructions should be given to the jury as requested, or the jury instructed as in the said charge of the court, the opinions of the said judges were opposed.

81 Whereupon, on motion of the plaintiffs, H. B. Claflin & Co., by counsel, that the points on which the disagreement hath happened may during the term be stated under the direction of the judges, and certified under the seal of the court to the Supreme Court to be finally decided,

It is ordered that the foregoing state of the evidence and cases, and the questions on which the disagreement of opinion hath happened, which is made under the direction of the judges, be certified according to the request of the plaintiffs by their counsel and the law in that case made and provided.

And it is further ordered that a copy of the pleadings be also made a part of the transcript certifying said questions in one of said cases.

82 United States circuit court, district of Minnesota, eighth circuit. June term, 1880.

HORACE B. CLAFLIN ET AL.
vs.
THE MERCANTILE INSURANCE CO. OF CLEVELAND, OHIO.

HORACE B. CLAFLIN ET AL.
vs.
THE NORTHWESTERN NATIONAL INS. CO. OF Milwaukee, Wis.

HORACE B. CLAFLIN ET AL.
vs.
THE COMMONWEALTH INSURANCE CO. OF BOSTON, Massachusetts.

HORACE B. CLAFLIN ET AL.
vs.
THE FRANKLIN INSURANCE CO. OF ST. LOUIS, Mo.

HORACE B. CLAFLIN ET AL.
vs.
THE WESTERN ASSURANCE CO. OF TORONTO, Canada.

83 Whereas the *the* three actions last above entitled came on for trial at said term, and were tried before a jury, and a verdict rendered in favor of the defendants, and the action first above entitled was tried at a previous term of said court, and a verdict rendered in favor of the defendant, and a motion was made for a new trial therein, was argued and submitted, but not yet decided, and the action second above entitled was tried at a previous term of this court before a jury; and a verdict rendered in favor of the plaintiff, and upon motion made by the defendant for a new trial, set aside and a new trial ordered; and whereas a certificate of division was made in open court by the honorable Samuel F. Miller and Hon. R. R. Nelson, presiding at the trial thereof at this term of said court, and the point of law involved in said division involves and is applicable to all the above-entitled causes and one of the turning points in all of the same:

Now, therefore, it is hereby stipulated that if the Supreme Court of the United States shall, upon said certificate of division, sustain
84 and affirm the charge as given to the jury upon the trial of the said last three cases, then judgment may be entered in favor of the defendants upon the two causes also first above entitled, and the judgment now entered, or to be entered, in the three causes last above entitled may proceed to execution.

And it is further stipulated and agreed that if the Supreme Court shall

hold that there was error in the charge as given to the jury or in refusal to give the charge as requested upon the question upon which the opinion of the judges was opposed, then all four last above-entitled causes, and the case first above-entitled in the event that a new trial shall then be or dered therein, shall proceed to trial before the same jury and be tried and disposed of together at one trial.

JOHN B. & W. H. SANBORN,
Plaintiffs' Attorneys.

Dated St. Paul, Minn., July 8, 1880.
(Indorsed): Filed July 8, 1880. H. E. Mann, clerk.

85 Supreme Court of the United States. October term, 1880.

HORACE B. CLAFLIN AND CO., PLAINTIFFS IN error,
vs.
THE COMMONWEALTH INSURANCE COMPANY OF Boston, Mass., defendant in error.

THE SAME
vs.
THE FRANKLIN INSURANCE COMPANY OF SAINT Louis, Mo., defendant in error.

THE SAME
vs.
THE WESTERN ASSURANCE COMPANY OF Toronto, Canada, defendant in error.

It is hereby stipulated and agreed by and between the parties to the above-entitled causes, by their respective attorneys, that the citations heretofore issued and served in said causes, returnable on the first Monday in October, A. D. 1880, shall stand and be valid in the same manner and to the same extent as if they had cited the defendants in error to appear on the second Monday in October, A. D. 1880, and all defects and
86 errors in said citations are hereby waived.

YOUNG & NEWEL,
STANFORD NEWEL,
Att'ys for Def'ts in Error.
CHARLES KING,
GEORGE A. KING,
Att'ys for Pl'ffs in Error.

(Indorsed:) 891, 892, 893. Supreme Court United States. October term, 1880. H. B. Claflin and Co., plaintiffs in error, vs. The Commonwealth Ins. Company et al., def'ts in error, and two other cases. Stipulation to correct citation. Filed 2d May, 1881. John B. & W. H. Sanborn, Charles & George A. King, att'ys for plaintiffs in error.

(Indorsement on cover:) No. 290. Horace B. Claflin, Edward E. Eames, Horace J. Fairchild, William S. Dunn, Dexter N. Force, Daniel Robinson, & John Claflin, copartners as H. B. Claflin & Co., plaintiffs in error, vs. The Commonwealth Insurance Company of Boston, Mass. No. 291. Horace B. Claflin, Edward E. Eames, Horace J. Fairchild, William S. Dunn, Dexter N. Force, Daniel Robinson, & John Claflin, copartners as H. B. Claflin & Company, plaintiffs in error, vs. The Western Assurance Company, of Toronto, Canada. And No. 292. Horace B. Claflin, Edward E. Eames, Horace J. Fairchild, William S. Dunn, Dexter N. Force, Daniel Robinson, and John Claflin, copartners as H. B. Claflin & Company, plaintiffs in error, vs. The Franklin Insurance Company of St. Louis, Missouri. Minnesota C. C. U. S. Filed 29 September, 1880.

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SUPREME COURT of the UNITED STATES.

NO. 290.

HORACE B. CLAFFLIN et al.

PLAINTIFFS IN ERROR.

vs.

THE COMMONWEALTH INSURANCE COMPANY OF BOSTON, MASSACHUSETTS.

NO. 291.

HORACE B. CLAFFLIN et al.

PLAINTIFFS IN ERROR.

vs.

THE WESTERN ASSURANCE COMPANY OF TORONTO, CANADA.

NO. 292.

HORACE B. CLAFFLIN et al.

PLAINTIFFS IN ERROR.

vs.

THE FRANKLIN INSURANCE COMPANY OF SAINT LOUIS, MISSOURI.

BRIEF OF PLAINTIFFS IN ERROR.

JOHN B. SANBORN,
Counsel for Plaintiffs in error.

JOHN B. & W. H. SANBORN,
Attorneys,
St. Paul. Minn.

SUPREME COURT of the UNITED STATES.

NO. 290.

HORACE B. CLAFFLIN et al.

PLAINTIFFS IN ERROR.

VS.

THE COMMONWEALTH INSURANCE COMPANY OF BOSTON, MASSACHUSETTS.

NO. 291.

HORACE B. CLAFFLIN et al.

PLAINTIFFS IN ERROR.

VS.

THE WESTERN ASSURANCE COMPANY OF TORONTO, CANADA.

NO. 292.

HORACE B. CLAFFLIN et al.

PLAINTIFFS IN ERROR.

VS.

THE FRANKLIN INSURANCE COMPANY OF SAINT LOUIS, MISSOURI.

BRIEF OF PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

These three respective suits were brought upon three respective policies of insurance issued by the respective defendants to one Frances E. Barrett, insuring her and her assigns against loss or damage by fire upon a certain stock of merchandise in Saint Paul, Minnesota. Afterwards and before the fire these policies were assigned by said Frances E. Barrett to one William Murphy, who had purchased and taken possession of the goods with the consent of the respective defendants. Thereafterwards and on the 25th day of February, A. D. 1877, the said stock of goods so insured by the defendants was destroyed and damaged by fire to the extent of eleven thousand eight hundred and four 72-100 dollars, as determined by arbitrators appointed in pursuance of the terms of said respective policies, the defendants, however, in submitting to said arbitration reserving all rights of defence they might have to claims for loss under said policies.

These suits were brought against the respective defendants for the proportion of said loss as determined by the arbitrators which pertained to the respective policies issued by them and held at the time of the fire by said Wm. Murphy, the claims against the companies arising by reason of said policies and fire having been assigned by said Murphy to the plaintiffs in error. The respective policies upon which these actions were brought contained among others the following provisions, viz: That of the defendant in error, The Western Assurance company of Toronto, Canada: "The assured shall if required submit to an examination or examinations under oath by any person appointed by the company and subscribe thereto when the same is reduced to writing," and also "all fraud or attempt at fraud by false swearing or otherwise shall forfeit all claim on this company and be a perpetual bar to any recovery under this policy;" that of the defendant in error, The Franklin Insurance company of Saint Louis: "And the insured shall if required submit to an examination under oath by the agent or attorney of this company and answer all questions touching his, her or their knowledge of anything in relation to such loss or damage or to their claim thereupon and subscribe such examination, the same being reduced to writing," and also, "all fraud or false swearing shall cause a forfeiture of all claims on the insurers and shall be a full bar to all remedies against the insurer on the policy;" that of the defendant in error, The Commonwealth Insurance company, of Boston: "All fraud or attempt at fraud by false swearing or otherwise shall cause a forfeiture of all claims on this company under this policy," and also, "The assured shall, if required, submit to an examination or examinations under oath by any person appointed by the company and subscribe to such examinations when reduced to writing." The defendants in error, among other defences, pleaded that said Murphy, the assured, at the time of the fire, was examined by an agent for them respectively as provided in said policies, and in such examination did swear "that he had purchased said stock from said Barrett and that he was the sole owner thereof and that no other person had any interest therein, and that he had fully paid for the same, each of which statements was false," and this was one of the principal defences on the trial of these causes. And there was evidence tending to show that the statements made by Murphy under oath to said agents as to the manner in which he paid for the stock were in some respects incorrect, and the plaintiffs in error introduced evidence tending to show that the assured answered thus incorrectly under oath with no purpose to deceive or defraud the defendants in error, but for the sole purpose of making his statements correspond with a statement that he had made a few days before the fire to R. G. Dun & Co.'s commercial agency at Saint Paul with a view of obtaining a large commercial credit in eastern cities, which statement to said agency was to the effect that he had bought the stock of Frances E. Barrett for $35,484.20 and paid for the same. And after the evidence was all in the plaintiffs in error by their counsel asked the court to charge the jury upon this defence as follows: "*If you find from the evidence that any incorrect statements made by said William Murphy upon his examination were made for the purpose of protecting himself against the statements made by him to the commercial agency for the purpose of obtaining more credit than he was actually entitled to and not for the purpose of deceiving and defrauding the defendants, then such statements constitute no defence to this action*; and also: "*No false statements made by Murphy on his examination under oath or otherwise constitute a defence to this action unless the same were made upon material issues between him and the defendant, and unless you are satisfied from the evidence that Mr.*

Murphy made them knowingly and willfully with intent thereby to deceive and defraud the defendants." This the court through the honorable associate justice refused to do, and upon this defence charged as follows, viz: "I don't think it was necessary in order to avoid the policy that the statements made by Mr. Murphy should have been solely or even partly with a view to get money wrongfully out of the companies * * * * * * and so far * * * as his testimony before the notary had a tendency to mislead the companies on an important matter it was false swearing and false testimony within the meaning of the policy and would avoid the policy * * * * * * If he stated that which was intended for their action and which would probably influence their action and these statements were false then, he swore falsely within the meaning of the policy, though he did not intend to cheat them, but intended to cheat somebody else, for without looking to his motives the company had a right to an honest statement from him to all questions that went to show whether he was the owner of these goods or not." To the refusal to charge as requested, and to the charge as given the counsels for the plaintiff in error excepted. The jury thereupon rendered a verdict for the defendants, and the counsel for the plaintiffs in error moved for a new trial on said exceptions, which motion was denied by the said Hon. associate justice of the supreme court. And upon the question as to whether said instructions should have been given to the jury as requested or the jury instructed as in said charge of the court the said judges disagreed, the said associate justice adhering to the charge as given and the district judge holding that the instructions asked by counsel for plaintiffs in error should have been given, andthe court upon request of counsel for plaintiffs in error ordered that said disagreement be certified to this court, and judgment was entered upon the verdict for defendants in error, and a writ of error issued to this court.

ASSIGNMENTS OF ERROR.

1st. There was error in this. That the court aforesaid, upon the trial of the causes aforesaid, upon issues of fact before a jury finding and perceiving that one of the most material and vital issues of fact to be determined by said trial was, whether the assured in making certain incorrect statements under oath after the fire to the agents of the defendants in error as to the manner in which he had paid for the stock of goods insured, to the party in whose favor they were originally insured, made the same with the intent and purpose of deceiving and defrauding the defendants in error, or without any such intent and solely with reference to certain other parties, instructed and charged the jury as follows, to-wit: "It is said here and the point is urged with a great deal of force, that unless Mr. Murphy made these false statements, if they were false, and it is conceded that they were false, with the intent to deceive and defraud these corporations, and if he made them with the intent to deceive and defraud some one else, that it is immaterial to this issue; I don't think that is the law. I don't think it was necessary in order to avoid the policy that the statements made by Mr. Murphy should have been solely or even partly with the view to get money wrongfully out of the companies, however that is a point I wish to draw your attention to. If these statements had been wholly immaterial, that doctrine might be right; if it was a matter that the company had no right to enquire into or interrogate him about, if he did swear falsely and intend to deceive someone else, that does not

interfere with the policy; but these companies had a right to have from him the truth about every matter that was material as evidence to show whether he owned these goods or not; they had the right to have the truth from him, whatever his intentions might have been; that is, as far as the truth was material; and so far as his testimony before the notary had a tendency to mislead the companies on an important matter, it was false swearing and false testimony within the meaning of the policy and would avoid the policy. If he stated that which was intended for their action, and which would probably influence their action, and these statements were false, then he swore falsely within the meaning of the policy, though he did not intend to cheat them but intended to cheat somebody else, for, without looking to his motives the company had a right to an honest statement from him to all questions that went to show whether he was owner of these goods or not," and refused to charge and instruct said jury at the request of the plaintiffs in error as follows, to-wit: "If you find from the evidence that any incorrect statements made by William Murphy upon his examination were made for the purpose of protecting himself against the statements made by him to the commercial agency for the purpose of obtaining more credit than he was actually entitled to, and not for the purpose of deceiving and defrauding the defendants, then such statements constitute no defence to this action," and also, "no false statements made by Murphy on his examination under oath or otherwise constitute a defence to this action unless the same were made upon material issues between him and the defendants and unless you are satisfied from the evidence that Mr. Murphy made them knowingly and willfully with intent thereby to deceive and defraud the defendant," all which was to the prejudice and injury of the plaintiffs in error, and to which charge as given and refusal to charge as requested the plaintiffs in error then and there duly excepted, and upon the point whether said charge should be given as requested by the plaintiffs in error, or as stated and given by the associate justice, the judges presiding at said trial disagreed.

2d. And there was manifest error in this, that the court aforesaid upon the trial of the suits aforesaid, upon the issue aforesaid, being requested by the plaintiff in error to instruct and charge the jury as follows, to-wit: "If you find from the evidence that any incorrect statements made by William Murphy upon his examination were made for the purpose of protecting himself against the statements made by him to the commercial agency for the purpose of obtaining more credit than he was actually entitled to and not for the purpose of deceiving and defrauding the defendants, then such statements constitute no defence to this action," and also, "no false statements made by Murphy on his examination under oath or otherwise constitute a defence to this action unless the same were made upon material issues between him and the defendants, and unless you are satisfied from the evidence that Mr. Murphy made them knowingly and willfully with intent thereby to deceive and defraud the defendants," did refuse to so instruct and charge the jury, and in lieu thereof did charge and instruct said jury as in the first assignment of error herein specified, to the prejudice of the plaintiffs in error as aforesaid.

3d. And there is error in this, that in and by the charge and instruction aforesaid of the court to the jury upon the trial of said causes, the jury were in effect charged and given to understand by the court that a valid and subsisting contract between parties may be avoided and annulled as to one party by the mistatements and misconduct of the other

though made and done with reference to something wholly foreign to the contract, and with no intent to injure, deceive or defraud the other party to the contract, and when the other party was not injured, deceived or affected thereby.

4th. Wherefore the plaintiff in error demands judgment that the judgment in said suits entered as aforesaid be reversed and said causes remanded for a new trial according to law.

POINTS OF LAW.

1st. False statements under oath made in an examination under an insurance policy, upon which the insurance company does not rely, by which it is not injured, deceived or induced to do any act, and which were made without any intent to deceive or defraud the company, do not constitute either "fraud or attempt at fraud by false swearing," and are no defence to an action on the policy.

Franklin Ins. Co. vs. Updegraff, 43 Pa. St. 350.
Marion vs. The Great Republic Ins. Co., 35 Mo. 148.
Parker vs. Amazon Ins. Co., 34 Wisconsin 364, 370.
Planters Mutual Ins. Co. vs. Deford, 38 Ind. 382.
Gerhauser vs. N. British Ins. Co. 7 Nev. 174.
Unger vs. People Fire Ins. Co. 4 Daly 96, 98.
Beck vs. Germania Ins. Co. 23 Am. 510.
Clark vs. Phoenix Ins. Co. 36 Cal. 168.
Wolf vs. Goodhue Fire Ins. Co. 43 Barbour 400.

2d. There can be no fraud unless there be a party defrauded. A statement under oath or otherwise to constitute a fraud must not only be false *but must operate injuriously upon the party to whom it is made.*

People vs. Cook, 4 Selden 67.
Cadleman vs. Griffin, 13 Wisconsin 555.
Oberlander vs. Spiers, 45 N. Y. 175.
Schonck vs. Morris, 7 Robertson N. Y. 658.
Cooley on Torts 474, 475, 501, 492-3.
Smith's Leading Cases, Vol. 1, 6th ed., p. 302.
Kiefer vs. Rogers, 19 Minn. 32.

3d. There can be no unsuccessful attempt at fraud either by false swearing or other false statements unless the party making the attempt actually intended to deceive and defraud the party upon whom the attempt was made by such false oaths or statements.

Hill vs. Little, 63 N. Y. 428, 433.
Addington vs. Allen, 11 Wendell, 375, 382, 388, 409, 414.
2 Smith's Leading Cases 6th ed. p. 170, 174, 178-9.
Lefler vs. Field, 52 N. Y. 621.
Cheeler vs. Comstock, 40 N. Y 575.
Marsh vs. Falher, 40 N. Y. 567.
Lord vs. Goddard, 13, How. U. S. 211.
Stafford vs. Newson, 9 Ind. L. 507, 510.
Munroe vs. Gardner, 3 Brevard (S. C.) 31, 34, 35.

4th. This question of intent to defraud is a question of fact to be settled by a jury.

Lord vs. Colby 6, N. H, 99.
Pope vs. Hart, 35 Barb. 630.

ARGUMENT.

These cases come before this court upon a certificate of division of opinion between Judges Miller and Nelson :

FOLIOS 80, 81, TRANSCRIPT.

The question to be determined in these cases is simply this :

If a merchant for the purpose of obtaining credit from H. B. Clafflin and Co. states to a mercantile agency that he has paid $35,484.20 for a stock of goods which he has bought and is in possession of when in fact he is still indebted for a part of the purchase, and after a loss of $11,804.72 by fire on an exparte examination before a notary under a policy of insurance without counsel he makes the same incorrect statement under oath for the sole purpose of maintaining his credit and remaining consistent with his former statement and *without any intention thereby to deceive or defraud the insurance company or to obtain any money wrongfully therefrom and if the company is not in any way deceived or defrauded thereby and does not in any way rely upon the same or pay any money on account thereof*, but H. B. Clafflin and Co. give credit to the merchant upon such statement and sell him a large amount of goods for which after the loss has occurred they take an assignment of the claim under the policy, is the fact that the merchant made such an incorrect statement under oath as did not deceive or defraud the company and was not intended to deceive or defraud it—such a "fraud or attempt at fraud by false swearing" as will defeat all claim under the policy, and thus relieve the insurance company which was not deceived or defrauded or intended so to be of its just liability under its contract and deprive Clafflin and Co. the creditors who were intended to be and were deceived and defrauded into giving a large credit of there last and only chance to collect their just debt.

That we have stated this question fairly is shown by the Transcript of the record : That the merchant Murphy made the statement mentioned to the commercial agency with the view of obtaining credit, that there was evidence that he made the same statement under oath on the examination under the insurance policies with no purpose to deceive or defraud the companies but solely for the purpose of showing himself consistent with the statement made to the agency appears at

FOLIO 77, TRANSCRIPT.

That the policies in suit were originally issued to Frances E. Barrett and before the fire, were duly assigned to the merchant William Murphy. *with the consent and approval of the companies* and that Murphy held them as the owner of the stock burned at the time of the fire appears at

FOLIOS 74 and 75, TRANSCRIPT.

That the stock of goods was damaged by fire and the amount of damage determined by arbitrators under the policies to be $11,804.72 appears at

FOLIO 74, TRANSCRIPT.

That the claims of Murphy under the policies for the damage by fire were duly assigned to his creditors, Clafflin and Co., appears from the pleadings and certificate that the question at issue here is a material point in the case.

FOLIO, 36, 80, 83, TRANSCRIPT.

That the insurance companies did not rely on this sworn statement of Murphy's, and were not in any way deceived or defrauded thereby, and paid nothing on these policies on account thereof, appears from the fact that they are here still contesting these cases.

Now we insist that these incorrect statements of Murphy under oath if they were made as the evidence tended to show they were, without the intent to deceive or defraud the insurance companies, and if, as the contest now going on proves, they did not deceive or defraud the companies, constituted no defence to these actions: that his honor, Judge Miller, was in error in refusing to give to the jury the charges we requested (Transcript, Folios 77 and 78) and in charging them as he did, among other things as follows: "I don't think it was necessary, in order "to avoid the policy, that the statements made by Mr. Murphy should "have been solely or even partly with a view to get money wrongfully "out of the companies," * * * * * * * * "and so far as his tes- "timony before the notary had a tendency to mislead the companies on "an important matter it was false swearing and false testimony within "the meaning of the policy, and would avoid the policy." * * * * "If he stated that which was intended for their action, and which would "probably influence their action, and these statements were false, then "he swore falsely within the meaning of the policy, though he didn't "intend to cheat them, but intended to cheat somebody else, for with- "out looking to his motives the company had a right to an honest state- "ment from him to all questions that went to show whether he was the "owner of these goods or not."

Transcript, Folios 79, 80.

And that his honor, Judge Nelson, was correct in his opinion that this charge of Judge Miller's was wrong, and that our requests should have been given.

Transcript, Folios 80, 81.

The three cases which the verdict obtained under this charge determined were not tried together by our consent, but were ordered to be tried together against our earnest protest.

Transcript, Folios 58, 59.

Two cases, resting upon the same pleadings and evidence against other companies had been tried in the court below before this trial, in one of which a verdict had been rendered for the defendant and in the other a verdict was rendered for the plaintiff.

In both these cases—one of which was tried by His Honor Judge Dillon, and the other by His Honor Judge Nelson, the requests were asked here were given to the jury as the law,—and the verdict in the second case was set aside and a new trial granted because His Honor Judge Miller conceived that Judges Dillon and Nelson erred upon the point now in controversy here.

Transcript, Folio 83.

In the case tried before him, His Honor Judge Dillon, charged the jury upon this point as follows:

"The defendant in the case relies upon the fraudulent representations " and actions of the insured for the defense, that is Mrs. Barrett and " Murphy—the insurance was originally to Mrs. Barrett and afterwards " by assignment to Mr. Murphy. Before it can succeed in this case, that is

" before the company can—it must establish by a fair preponderence of " testimony that these actions and representations, that is, the actions " and representations of the assured—that is, Mrs. Barrett and Johnson " acting for her and Murphy afterwards, were fraudulent, and that they " were had and made by the assured wilfully and intentionally for the " purpose of deceiving and defrauding the insurance company * * * * *

"If you believe from the evidence that any incorrect statements made "by William Murphy upon the examination made by the defendant "and other insurance companies and that his refusal to answer questions "upon said examination, *were for the purpose and with the intent simply not "to be inconsistent with his statements that he had previously made to parties "other than insurance companies respecting the purchase of and payment for said "stock and that he had no intent to defraud the defendant thereby, then such "statements and refusals constitute no defense to this action.*

"No false statements constitute a defense to this action unless the "same were made on a material issue between him and defendant and "unless you are satisfied, *that Murphy made the same knowingly and wil- "fully and with the intent to deceive the insurance company.*"

His Honor Judge Nelson, in the case tried before him, gave the same charge as Judge Dillon upon this point.

I.

False statements under oath made in an examination under an insurance policy, upon which the insurance company does not rely, by which it is not injured or induced to pay money and which were made without any intent to deceive or defraud the company do not constitute either fraud or attempt at fraud by false swearing, and are no defense to an action on the policy.

Franklin Ins. Co. vs. Updegraff, 43 Pa. St. 350.

In this case the insured had falsely sworn in his proofs of loss that his stock was covered by two policies, whereas it was not and the company defended on this ground. The court below in charging the jury said: "The policy does declare that all false swearing or fraud shall "cause a forfeiture of all claims of the insured and shall be a full bar to "all remedies on the policy against the insurers.

"To cause a forfeiture the swearing should not only be false, but it "should be knowingly and willfully so done with a view to cheat the "company.

"The Pennsylvania Supreme Court said:

"We entirely concur in what was said by the court in answer to the "points proposed. The conditions of the policy are to receive a reason- "able construction and no other than that given by the learned Presi- "dent of the Common Pleas would be reasonable or accord with the "obvious intent of the parties when the contract was made."

In Marion vs. The Gt. Republic Ins. Co. 35 Mo. 148.

The Supreme Court of Missouri sustains our proposition and condemns a request for an instruction identical in effect with that given by Judge Miller in the following words :

"The clause in the policy in respect to false swearing is to be viewed "in connection with all the other parts of the policy and the general "nature of the contract and so viewing it, it is obvious that it was in- "tended thereby to require the insured to give the insurer real and "reliable information as to the amount of the loss, and that a mistake "or unintentional error or misstatement of an immaterial matter in the "sworn statement would not avoid the policy, *but the false statement must*

"be wilfully made in respect to a material matter, and with the purpose to de-
"ceive the insurer.

"Now this instruction requires that the false statement (that is the "statement made in ignorance of its truth) shall have been knowingly "made, but does not require that the jury shall find that it was in respect "to a material matter or made with an intention to deceive the defend-"ant. It might probably be inferred that the matter was material, but "under that instruction if given the jury would have been required to "find for the defendant, notwithstanding the false statement was not "intended to deceive the defendant and did not deceive it, and the plain-"tiff derived and could derive no advantage from it and the defendant "received and could receive no detriment from it. No doubt an indict-"ment for perjury might be supported by proof of a swearing to the "truth of matters of which the accused was ignorant (and which might "in fact be true) but the prosecution for perjury is distinctly for the "offense of false swearing, irrespective of the effect of the falsehood, "whilst here the clause as to false swearing is part of a contract be-"tween two persons and is important only in its effect actual, presumed "or intended: It is no part of the intention of the parties to punish "one of them for an immoral or illegal act, but the provisions of the "contract have reference only to their intents in respect to the subject "matter of the contract."

In Parker vs. Amazon Ins. Co. 34 Wis, 364-70:

The plaintiff swore falsely as to the ownership of the property but the court held this was no defence unless he so swore knowingly and wilfully with intent to deceive and defraud the company.

In the Planters Mutual Ins. Co. vs. Deford 38 Ind. 382:

The plaintiff swore falsely as to the number of hides destroyed and the court held such false swearing did not vitiate the policy where there was no intention to defraud.

In the following cases the courts held that false swearing as to the amount or value of property or of damage to it did not vitiate the policy unless it was proven to have been knowingly and wilfully done with intent to deceive and defraud the companies.

Gerhauser vs. N. British Ins. Co, 7 Nev. 174.
Unger vs. People's F. Ins. Co., 4 Daly, 96, 98.
Beck vs. Germania Ins. Co, 23 La. Ann. 510.
Rockford Ins. Co. vs. Nelson, 75 Ill. 548.
Clark vs Phœnix Ins. Co., 36 Cal. 168.
Wolff vs. Goodhue F. Ins. Co., 43 Barb. (N. Y.) 400.

Wood on Fire Insurance at page 744 says that the insurer must prove that the insured knowingly and intentionally swore falsely with intent to defraud the company in order to avail itself of the defense of the invalidity of the policy on account of false swearing. See authorities there cited.

II.

There was no "fraud or attempt at fraud by false swearing" proved in these cases, if the evidence as to Mr. Murphy's intent in the matter was true, and the jury that last passed upon it found that it was true and gave plaintiffs a verdict.

The provisions of the policy of the Commonwealth Insurance Com-

pany, the one upon which the charge was given, is "All fraud or at-"tempt at fraud by false swearing or otherwise, shall cause a forfeiture "of all claims on this company under this policy."

A. There was no fraud by false swearing in this case.

There can never be a fraud unless some one is defrauded. Neither false statements nor false oaths constitute a fraud unless they are relied upon by and injuriously affect some one—and in the case at bar the statements of Murphy were not believed or relied upon by the companies and they were not thereby induced to pay any money or in any way injuriously affected so that no fraud was accomplished by the false swearing.

"A statement to constitute a legal fraud must not only be false but "must operate injuriously upon the party to whom it is made."

People vs. Cook, 8 N. Y. (4 Seld.) 67.
Castleman vs. Griffin, 13 Wis. 555.
Oberlander vs. Speers, 45 N. Y. 175.
Schonck vs. Morris, 7 Robt. (N. Y.) 658.

B. There was no attempt at fraud by false swearing if Murphy made these statements under oath without any intent to deceive or defraud the companies.

There could not, in the nature of things, be an unsuccessful attempt at fraud by false swearing without the intent to deceive and defraud the companies on the part of the one attempting the fraud. If he swore falsely without any intent to deceive or defraud the companies, then he certainly was not attempting fraud on them by false swearing.

Hill vs. Little, 63 N. Y. 428-433.
Addington vs. Allen, 11 Wend. 375-382-388-409-414.
2 Smith's Leading Cases, (6th Ed.) 170-174-178-9.
Leefler vs. Field, 52 N. Y. 621.
Chester vs. Comstock, 40 N. Y. 575.
Marsh vs. Falker, 40 N. Y. 567.
Lord vs. Goddard, 13 How. (U. S.) 211.

III.

It was urged by defendant's counsel below, and remarks of text book writers and authorities were cited to show, that an action for deceit could be maintained and a recovery of damages for fraud had in cases where the deceiver or defrauder had no intent to deceive or defraud, and from these authorities it was argued that it was not material whether Mr. Murphy intended to deceive or defraud the companies or not.

Our answer to these authorities and this argument is:

The authorities are all in cases where the plaintiff relied upon and was injuriously affected by the false statement or representation, and in some such cases the law to protect the person injured imputes a malicious intent to and allows a recovery against one who has innocently deceived the sufferer to his injury, but these authorities are not in any way analagous to, and have no bearing upon the case at bar, since here the defendants did *not* rely on the statements, and were not injuriously affected thereby.

A fraudulent intent,—an intent to deceive and defraud is *never* presumed against any one in any case where a fraud has not been accomplished, and then it is presumed *solely to protect the one injured by the rep-*

resentations, hence it can not be presumed in the case at bar since no one relied upon or was affected injuriously by the false swearing.

The following propositions state our positions in reference to this question of fraud.

If one states in a negotiation, or under oath, to an insurance company that which he knows to be false or that which is false in fact, but which he believes to be true—or that which is false in fact and of the truth or falsity of which he has no knowledge—without *any intent to deceive the party to whom the statement is made to his injury—that is to defraud him* and the party to whom the statement is made is not thereby induced to act, to his injury and does not rely thereon—then there is no fraud or attempt at fraud, but if the second party does rely upon such statement and does act thereon to his injury there results a constructive fraud—a fraud which the law *presumes only for the purpose of protecting the party who has relied upon the statement and been injured thereby.*

Cooley on Torts, 492-3
Kiefer vs. Rogers, 19 Minn. 32.
Cooley on Torts, 500—501.
Smith's Leading Cases, Vol. 1, 302.
Oberlander vs. Spiers, 45 N. Y. 175.

But if a party states in a negotiation with another or under oath to an insurance company that which he knows to be false *with the intent to deceive the second party to his injury thereby, that is, to defraud him*, and the statement relates to a thing material to the negotiation—that constitutes an attempt at fraud by false swearing or otherwise and if the second party relies upon this statement or oath and is deceived thereby to his injury, that is defrauded, that makes the accomplished fraud.

Cooley on Torts, 474, 475, 501.
Smith's Leading Case, Page 302.

Now Mr. Murphy never made any statement under oath or otherwise upon which the insurance company relied or by which it was induced to act to its injury—so that no constructive fraud could exist in this case.

Again there was no accomplished fraud from his oaths or statements because the company was not misled by them or induced to act to its injury thereby. There could therefore have been only an unsuccessful attempt at fraud by false swearing at most and whether there was such an attempt depended upon the question whether Mr. Murphy swore falsely with intent to deceive or defraud the companies—we insisted then and still insist that he had no such intent —that his sole purpose was to keep up his business credit and be consistent with his former statements,—we introduced evidence to prove this position,—we had proved it to the satisfaction of the jury that tried the case just preceding—and we insist that we were entitled to the verdict of the jury in this case upon that question.

It is not sufficient even in an action for deceit—much less is it in a defence founded on attempt to deceive or defraud—to prove that the representations were calculated to deceive but they must be made *with the intent to deceive.*

Stafford vs. Newson, 9 Ired (F. C.) L. 507–510.
Munro vs. Gardner, 3 Brevard (S. C.) 31–34–35.

And this question of the intent to defraud is a question of fact to be settled by a jury.

Lord vs. Colby, 6 N. H. 99.
Pope vs. Hart, 35 Barb. 630.

IV.

Finally the effect of the charge of His Honor Judge Miller was "this man has sworn falsely on a material point, therefore the defendant is entitled to a verdict."

He told them that the questions Murphy answered incorrectly were on a material point (Transcript, Folio 78) that it was conceded that the answers or statements were false (Transcript, Folio 79) and that these false statements under oath would avoid the policy whether made with intent to deceive or defraud the companies or not. (Transcript, Folios 78–79.) This charge left absolutely nothing for the jury to determine and we have never yet understood, why he did not order a verdict for the defendant directly since if his charge is correct no verdict for the plaintiff could stand for a moment.

This charge is based upon the theory that false swearing on a material point avoids the policy. That is not the contract in this policy or in any policy—for the legal effect of the clause in the Franklin policy is the same—false swearing does not avoid the policy—it is only "*fraud or attempt at fraud by false swearing*," that avoids and we respectfully submit that we have clearly shown here.

1. That there was no fraud by false swearing on this case, because the false statements were not relied upon or acted upon to their injury by the companies.

2. That at most there could have been nothing more than an unsuccessful attempt at fraud by false swearing.

3. That the gist of fraud and all actions and defences founded thereon is the intent of the accused by his oaths or statement to deceive and defraud the party prosecuting or defending.

4. That no fraud or attempt at fraud can exist, without this actual evil intent to deceive and defraud the injured one in any case save where one has been actually defrauded by the innocent misrepresentations of another where the law solely to protect the injured presumes the intent.

5. That in the case at bar no injury resulted to the companies from, and they never relied upon the statements and therefore no intent to deceive or defraud them can be presumed.

6. That in the nature of things one can not be guilty of an unsuccessful attempt to defraud an insurance company, unless he had the intent to deceive and defraud them.

7. That the question whether Murphy had such intent when he made the false statements under oath was emphatically a question for the jury and one upon which we were entitled to their verdict.

8. That the instructions upon this question which were requested and which were given by Judges Dillon and Nelson are in accordance with the doctrine of the text books on insurance and the decisions of the courts upon the effect of the clause of the policy in question.

It seems to us that we are entitled to a reversal of this judgment and a new trial of these cases and this we ask. Permit us to say further that to defeat the plaintiffs in this case will not punish Mr. Murphy or reward any innocent man. Murphy has long since died. The plaintiffs have never been charged with any fraud or attempt at fraud in

these cases. They unfortunately relied on Murphy's statements to the mercantile agency and sold him goods in payment of which they received nothing but the claims against these companies. They now wait upon this court to learn whether a misrepresentation of Murphy which he made, with intent to deceive the plaintiffs and thereby to obtain goods from them and upon which they relied and acted to their injury, shall release these companies whom he did not intend to deceive or defraud and who were not deceived or defrauded thereby from these contracts of insurance which they made for value in the usual cause of their business.

JOHN B. SANBORN,
Counsel for Plaintiff in Error.

St. Paul, March 29, 1883.

JOHN B. & W. H. SANBORN,
Attorneys.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

HORACE B. CLAFLIN, *et al.*,
Plaintiffs in Error,
v.
THE COMMONWEALTH INSURANCE COMPANY, OF BOSTON, MASS.,
Defendant in Error.
No. 50.

HORACE B. CLAFLIN, *et al.*,
Plaintiffs in Error,
v.
THE WESTERN ASSURANCE COMPANY, OF TORONTO, CANADA,
Defendant in Error.
No. 51.

HORACE B. CLAFLIN, *et al.*,
Plaintiffs in Error,
v.
THE FRANKLIN INSURANCE COMPANY, OF ST. LOUIS, MISSOURI,
Defendant in Error.
No. 52.

BRIEF AND ABSTRACT OF ARGUMENT IN REPLY.

JOHN B. SANBORN,
Of Counsel.

J. B. & W. H. SANBORN,
Attorneys for Plaintiff.

PIONEER PRESS CO., Printers, Stationers and Blank Book Manufacturers, St. Paul, Minn.

SUPREME COURT OF THE UNITED STATES.

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HORACE B. CLAFLIN, *et al.*, *Plaintiffs in Error,* v. THE FRANKLIN INSURANCE COMPANY, OF ST. LOUIS, MISSOURI, *Defendant in Error.*	No. 52.

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No. 52.

BRIEF AND ABSTRACT OF ARGUMENT IN REPLY.

The fallacy of the first position of the counsel for the defendants in error is that it begs the entire question at issue here. The argument, stripped of all guise, is that the assured, after his loss by fire, and after the liability of the

defendants in error to pay the actual loss by fire was absolute, was asked certain questions by the defendants in error relating to the manner in which he had paid for the goods damaged, and answered them incorrectly and falsely; that whoever answers another incorrectly and falsely intends to mislead and deceive another, and whoever intends to mislead or deceive another at all, intends to mislead and deceive him to his prejudice and damage; and whoever intends or attempts to mislead and deceive another to his prejudice and damage, commits or attempts to commit a fraud upon the other by false swearing or otherwise; and this, according to the terms of the contract, annuls the contract and policy. All this as the result of conclusive inferences and presumptions of law. The position of the plaintiffs in error is, that while all these false statements, sayings, doings, and acts of the assured are competent to go to the jury as evidence on the point of the validity of the sale and character of the sale from Barrett to Murphy, and become and are, upon a material point, within the correct rule of law, only upon condition that the jury find the sale sham and void. Otherwise, and if the jury find from all the evidence that the sale was valid—bona fide, and the assured the absolute owner of the goods and property insured at the time of the fire, they were immaterial, so far as defendants' rights and liabilities are concerned, for no prejudice or damage could result therefrom. Hence, the manifest error of the Court was committed in charging the jury that whatever was material as evidence for them to consider in determining who was the owner of the goods at the time of the fire, and whether the false statement made by Murphy *did* or could mislead the defendants in error to their prejudice (for if Murphy was found by the jury to have been the real, bona fide, lawful owner at the time of the fire, it would be immaterial to the companies how he became so,) " was material within the meaning of

"the policy;" that thereby "he swore falsely within the "meaning of the policy, though he did not intend to cheat "them"—mislead them to their prejudice and damage—"but intended to cheat somebody else." In other words, *materiality as evidence* is converted hereby to *materiality of obligation* or condition under the contract, and that which was solely a question of fact for the determination of the jury is converted into a question of law and disposed of by the Court—in effect taken from the jury.

Consider for a moment the practical results of the view of the Hon. Associate Justice presiding at this trial, as illustrated by the case at bar. The plaintiffs in error, wholesale merchants in New York, have a customer in Saint Paul who has goods of the value of thirty-five thousand dollars in his store insured for about their full value, and with whom they are dealing in the ordinary course of trade. A fire occurs, whereby these goods are damaged twelve thousand dollars, and the companies and assured appoint their arbitrators under the terms of the policy and adjust the loss at twelve thousand dollars, the companies reserving the right to resist the payment of the loss after adjustment. Now upon the theory of the plaintiff in error that there was an honest contract, honest loss and honest settlement, their customer has an asset of twelve thousand dollars as a basis of credit, and that no statements or representations that the customer can make short of an attempt to absolutely defraud them can destroy this asset or relieve the companies of their legal liability, no matter what the terms of the policy are, because they cannot be made upon a material point, the absolute liability of the company being the only thing to them material. But the companies come forward and advance their theory, viz.: that the contract, loss and adjustment were all dishonest, and the assured is called upon to testify. Can any repre-

sentations that he makes, anything he says or refuses to say, go farther or have any greater effect than to be evidence of the existing condition between the parties in interest under the contract? Can they have the effect to change or modify existing legal liabilities and obligations? "But" said the learned Judge, in his charge: "It is said "here, and the point is urged with a good deal of force, "that unless Mr. Murphy made these false statements, if "they were false, and it was conceded that they were false, "with intent to deceive and defraud these corporations, and "if he made them with the intent to deceive and defraud "some one else, that it is immaterial to this issue. I don't "think that is the law. I don't think it was necessary, in order "to avoid the policy, that the statements made by Mr. Mur-"phy should have been solely, or even partly, with the view "to get money wrongfully out of the company, however, "that is a point I wish to draw your attention to. If these "statements had been wholly immaterial, that doctrine may "be right; if it was a matter that the company had no "right to inquire into or interrogate him about, if he did "swear falsely and intend to deceive some one else, that does "not interfere with the policy; but these companies had the "right to have from him the truth about *every matter that* "*was material as evidence* to show whether he owned these "goods or not; they had the right to have the truth from "him, whatever his intentions might have been; that is, so "far as the truth was material, and so far as his testimony "before the notary had *a tendency* to mislead the companies "on an important matter, it was false swearing and false "testimony within the meaning of the policy and would "avoid the policy."

This is innovation. This is giving an effect to false swearing where there is no intention to defraud and no way

to defraud ever known to the law before. This is a usurpation of sovereign prerogatives and the imposition of fines and forfeitures ordinarily imposed by penal codes for the protection of society, for the use and benefit of insurance companies. This cannot be the result of any general law, and if sustained at all it must be sustained as a part and parcel—a condition of the contract. But the contract has no such condition. "Fraud by false swearing or otherwise." "Fraud or an attempt at fraud or false swearing," is the thing, the act that forfeits all claim under the policy. Hence, not truth about every matter *material as evidence*, but truth about every matter material *to the contract* and *liability of the defendants in error thereunder* was all that the contract required. Hence the question was for the jury, whether Murphy had sworn falsely within the meaning of the policies in swearing that he had bought the goods and paid for them in any manner. The material question to the company was not what denomination of bills, what bonds, what notes he gave, all which might be material as evidence, for no fraud could result whatever the answers might be, but the material question was whether Murphy had bought and was the owner of the goods. "Material" used in this sense means important, momentous, essential. Now if Murphy had bought the goods in good faith was it important or essential to the companies how or what he paid for them? Was it a fraud in law and would it vitiate his claim under the policies for the assured to answer falsely as to the form of consideration and manner of payment when the consideration agreed upon by the parties had actually been paid? How could the companies have been deceived to their injury thereby? Where is the fraud, where the injury, where the *legal* wrong against the defendants? If there is perjury, if there is moral turpitude, which society and law punish, then let the

penal code be invoked and the fines and forfeiture go to the public treasury where they belong, and not into the treasury of insurance companies or private individuals.

Now, let us suppose a case analogous, if not identical with the case at bar. A, for a valuable consideration, enters into a contract with B and his assigns, to pay him or them ten thousand dollars within one year from date, upon the happening of a certain event, and provides that fraud or any attempt at fraud by false swearing or otherwise as to the happening of said event by B or his assigns shall forfeit all claim under the contract. B assigns this contract to M. M has used it as a basis of credit with people to whom he has stated that he has paid for it in cash and securities, where in fact, he had bought upon credit. And when A questions M to save his credit, he falsely answers A the same way, and to stand consistent with this answer responds to many other questions on the same point falsely. Now, has M committed or attempted to commit any fraud on A? As legal liabilities and obligations are not changed, M has gained no new rights, and there is no fraud because there is no damage nor injury. To deceive is not in law necessarily to defraud, and hence the authority (27th Me. 308) cited has no applicability here. Intention to deceive and intention to defraud are, or may be, wholly distinct. Where the question is as to the extent of the loss, and the assured knowingly exaggerates his loss and makes false statements concerning the same, his conduct must of necessity be held fraudulent, for he invites the company to take a false position, to assume new and unjust obligations, to pay a loss that has not been sustained and does not exist, to do that which will prejudice and damage the company. But if the assured had made a true statement of his actual loss and then answered falsely for personal reasons, as to the parties from whom he had

purchased the goods, or the value of those purchased from a certain house, then there could be no fraud because there could be no prejudice or damage. The questions would be *material as evidence* but not *material as to the rights and liabilities of the company.*

Consider briefly the cases cited by the counsel for the defendants in error:

Lord *v.* Goddard, 13 Howard, 198.

This action was brought to recover damages sustained by Goddard by selling a cargo of lumber to West & Daley upon credit given upon the strength of a letter by the plaintiffs in error recommending West & Daley as men well worthy of credit, when they were in fact insolvent. The Circuit Judge charged the jury: That as a general rule it must be proved that the representations made were false; and that the defendants made them knowing that they were false, and intended to defraud the plaintiff. The defendants defended upon the ground that they recommended West & Daley in good faith, believing them to be solvent, and did not intend to deceive or defraud. The Circuit Court further charged, that if a party makes a positive statement as to the credit of an individual ignorantly, not knowing the credit of the person recommended, and without making proper inquiries, and the statement turns out to be false, the jury may infer that those so recommending did wrong and deceived. The verdict went against the defendant on this ground, and the Supreme Court reversed the judgment for error in the charge that the jury might infer that those so recommending did wrong and deceived, whether intending to or not. And Judge Catron, in the opinion reversing the judgment, used as applicable to that case, the expression quoted: "Fraud means an intention to deceive." That is, there is no fraud

without an intention to deceive, but there may be a thousand intentions to deceive without fraud. This Court in that case sustained the general rule—statements knowingly false and intended to defraud the plaintiff, and reversed the modification, that it might be inferred from acts or events in that class of cases. The doctrine of this case is on all fours with the case at bar, so far as applicable.

The case of Russell *v.* Clark, 7 Cranch, 79, is of precisely the same character, and Chief Justice Marshall well said: "A recommendation (of this kind) known at the time to be "untrue, would be deemed fraudulent." But this, like the other, pertains to a case where one party has parted with property, or may part with it, or be otherwise damaged, on the strength of the representation, while in the case at bar nothing the assured could say could increase the prima facie obligations or liabilities of the defendants, *but by the terms of the contract fraud or an attempt at fraud would diminish them, or relieve from them altogether.* Prima facie, *the defendants in error could not be damaged by any false statements or representations of the assured, and might be benefited by them, and the assured could not be benefited by them as against the defendants, and might be damaged.* Fraud was never before inferred from false statements that might be material as evidence merely under such circumstances. Of course, it must all the time be borne in mind that all the goods insured had passed to Murphy by bill of sale, delivery of actual possession, and this with the assent of the defendants in error, who had consented to the assignment of the policies, and no party to that sale has ever asked to have the sale modified or rescinded, or even to have it inquired into, except these companies who had no direct interest in it, and were interested collaterally only to the extent of knowing that it had no connection whatever bearing upon the fire. And answering falsely upon an inquiry

relative to a collateral matter is not a fact from which the law will conclusively presume fraud, but is a fact which the jury may consider, with all the other evidence, to determine whether the assured committed or attempted to commit a fraud in any way. If the title of these goods had passed to Murphy, if he was the absolute owner thereof, the rights and liabilities of the companies were wholly unaffected by any answer he might give. That this was his view is evident, and the fact is fully evidenced by two successive verdicts in his favor under the charge of Judge Nelson, and in the State Court under the charge of Judge Wilkin. But under the rule in the charge in this case the same conclusive effect is given to a false statement asked by a party who seeks to be relieved from existing liability resulting from his own act, as is given by law where liability and loss has actually occurred from the willful false representations and false statements of another. The rule we demand is that where loss and damage have actually resulted from false statements or false swearing knowingly made, fraud is conclusively inferred or presumed, but where *no liability or damage has resulted*, or where it is claimed on one side that it might have resulted, and on the other that it could not have resulted from the statements, then the false statements or swearing are only evidence of fraud, and the question will be for the jury to say from all the evidence whether the party making them thereby committed or attempted to commit a fraud. The law will not infer it in such a case—it must be found as a fact from the evidence. To this effect is Smith *v.* Richards, 13, P. 26. It is the false representation of a material fact whereby another is misled—put under a mistake, where advantage has accrued to the party making the representation, and damage to the other that is fraud in law. The position of the defendants here was not changed or affected in the least by the statements under oath of Murphy. There

is no prejudice, no damage, and if the defendants in error had paid these losses could the law permit the recision of the contracts or payments on the ground that the assignee of the policies and purchaser of the goods had bought them upon credit instead of paying cash, as he had represented. But, say the counsel for the defendants in error, and the court below inferentially at least, the companies might have acted upon these representations to their prejudice, and you cannot have the benefit of the fact that they did not. But because they were not deceived and misled, were not damaged, the law will not conclusively infer or presume fraud, and the question of fraud or attempt at fraud must go to the jury, and if they find none, then in law there was none, and the plaintiffs may recover, notwithstanding these statements.

Sleeper *v.* The Insurance Co., 58 N. H., 401.

This case was tried before a referee who found as a fact that the assured made oath that the value of the property lost was one thousand dollars, understanding at the time that it was materially less than that sum, although as much as six hundred dollars, the sum insured, and that *his purpose was to make a speedy settlement.* The Court say: "It "was an attempt on his part to deceive the insurers by a "statement which he knew to be false, and done with the "purpose of securing *some advantage to himself at the expense* "*of defendants.*" The very facts which we ask to have submitted to the jury in this case, and which are taken from them by the charge, are found in the New Hampshire case. Did the assured attempt to secure some advantage to himself? Did he attempt to put the insurers to expense? are the questions upon which we demanded, and now demand the verdict of the jury, and the Court said, if he know-

ingly swore falsely as to the manner in which he paid for the goods, no matter about his motive, he is within those conditions of the policy which forfeit all claim against the companies.

In Leach *v.* Republic Fire Insurance Co., 58 N. H., 245, the plaintiff swore that the value of his interest in the house burned was fifteen hundred dollars. The actual value was six hundred dollars, and the Court say: "Such a representation is fraudulent." In an over valuation such as made in this case, so grossly out of proportion to the actual value of the property, the plaintiff is not entitled to immunity from the charge of fraud.

In neither of these cases was there any claim that extrinsic circumstances wholly foreign to the policy and the insurers were operating upon the mind of the assured.

Hammatt *v.* Emerson, 27 Me., 309, was an action upon a note, and the defense was fraud by false representation concerning lands in part payment of which the note was given. Damages had been sustained, and the Court laid down the familiar doctrine, that, "The law does not make the vendor "responsible in damages for every unauthorized, erroneous "or false representation made to the vendee, although it "may have been injurious. To make the party liable the "representation must have been false, *have been fraudulently* "*made, and have occasioned damage.*" All the doctrine in that case relates to a case where damage had been sustained.

Pasley *v.* Truman, 3 Term. Rep., 51, was an action on the case to recover damages for falsely, fraudulently and deceitfully causing and procuring the plaintiffs to sell and deliver goods upon credit to one John Christopher. And the Court

adhered to a rule then well established, that " a false repre-
" sentation made by the defendant with intent to defraud
" the plaintiff, whereby *the plaintiff receives damage*, is the
" ground of an action on the case in the nature of deceit,
" etc."

Lord Kenyon, Justice Buller, and all the justices, in delivering their opinion, cite the doctrine in the 3 Bulstr., 95, where it was held by Croke, J. "that fraud without damage, or damage without fraud, gives no cause of action; but where these two do concur, there an action lieth." And the action was maintained on the grounds of deceit in the defendant *and injury and loss to the plaintiff.*

The quotation from Thorm *v.* Bigland, 8 Exch., 725, is a mere expression by Justice Park, made during the argument, stating the rule laid down in Corbett *v.* Brown, 8 Bing., 396, and in no respect in accord with the doctrine of the case. The defendants represented that the Celma was afloat with a cargo of palm oil, and that out of said cargo he would furnish plaintiff twenty-five tons at 30*l.* per ton, after he had delivered eight hundred tons to other parties. This took the whole cargo, and the plaintiff was compelled to buy twenty-five tons at a higher price. The Court held the action could not be maintained, for although there was damage, there was no *fraud nor intent to deceive.*

Ormrod *v.* Huth *et al.*, 14 Meeson & Welsbys, 651, is another case where there was damage without fraud, and it was held that the action would not lie. The syllabus is, Where cotton was sold by sample upon a representation that the bulk corresponded with the sample, but no warranty was taken by the purchaser, and the bulk of the cotton turned out to be of inferior quality and to have been falsely packed, though

not by the seller: Held, That an action on the case for a false and fraudulent representation was not maintainable without showing that such representation was false to the knowledge of the seller, or that he acted fraudulently and against good faith in making it. The Court held the old rule, that where there was damages in fact, as in that case, if the representation was false to the knowledge of the party making it, this would in general (in such a case) be conclusive evidence of fraud. And that unless false in fact, and known to be such by the party at the time, there being no warranty, the rule of *caveat emptor* would apply, and the representation, though false, would not furnish a ground of action.

So in Corbett *et al. v.* Brown, 8 Bing., 33, the fraudulent representations and damages came together. In answer to a question asked by plaintiff concerning the property of his son, the defendant answered that he had 300*l.*, when in fact he had nothing. On the strength of this the plaintiff sold the son goods upon credit. The son became insolvent and the plaintiff could not collect of him. Here are statements knowingly and willfully false and damages resulting therefrom, and the Court adhered to a rule then old, that where false representations had been made and damages sustained by reason thereof, the court must infer fraud.

Moens and others *v.* Heyworth and others, 10 M. & W., 147, is the same character of action. Damages sustained by the purchase of three thousand one hundred and fifty bags of coffee as of first shipping quality, induced by representations to this effect by defendant, which proved to be of very inferior quality. Here again was damages without an intentional false statement, knowing it to be false, and the Court held that an action in tort would not lie, and again the Court held that to enable the plaintiff to recover in such a case, in

addition to damages, "he must prove a representation by "words or acts of that as being true, which was known to "the defendant to be untrue."

To the same effect is Lobdell *v.* Baker, 1 Met., 193. Defendant procured a minor to endorse a negotiable promissory note, and then sold it to a stranger on the strength of this endorsement. Here were false representations known to be false, and damages resulting therefrom.

Holmes *v.* Clark 10, Iowa, 423, holds the English rule simply that to enable a vendee to recover damages of a vendor for representations made in a contract of sale, it must be shown (1), that such representations were false; (2), that the vendor knew them to be false when making them, and (3), that they were made for the purpose of inducing, *and did induce* the vendee to enter into the contract.

Haycraft *v.* Creasey, 2 East, 92, is another case of damages from false representations, and the Court held there must be damages to the plaintiff, and fraud in the defendant, and the language quoted was appropriate to the case.

Foster *v.* Charles, 6 Bing., 396, the willful false representations and damages came together and the action was sustained. Tindal, C. J. stated the precise point. He was guilty of fraud in law by stating that which he knew to be false, and which was the cause of loss to the plaintiff.

Polhell *v.* Walter is another case where there was damages, and where the law presumes fraud.

Clark *v.* Phœnix Insurance Co., 36 California, 168, simply holds on this point; "That, upon the question of fraud and

"false swearing by the insured, so as to deprive him, in case "of loss, of any benefit under the contract, any discrepancy "found to exist between his sworn statement of his losses and "the actual loss, as proved at the trial of an action against the "insurer for a breach of an insurance contract, which can "be reasonably accounted for on the score of opinion is entitled "to no weight. On the contrary such discrepancy will be "considered as evidence of fraud or false swearing on the part "of the insured, only when it is such as to show a material "and intentional over valuation by him."

Now, what is the precise state of the law upon this subject of fraud or attempt at fraud and the rule of evidence applicable thereto?

1. That all the presumptions of law are in favor of innocence and proper motives of men in all their acts and sayings.

2. That where a party has been deprived of his property or cheated out of it by the negligent, careless, or deceitful acts of others, the law will conclusively presume fraud, for it is a conclusive presumption that men intended to do what they have done.

3. That the last rule does not apply to cases of recommendations for credit, if honestly given, even though loss accrues therefrom. The law imputes liability in this class of cases only where there is found a willful intention to deceive and defraud.

4. That in all cases where no fraud has been perpetrated—that is, where a party has not been cheated out of his property or damnified in any way—no sayings, oaths, or acts of a

party are *conclusively* presumed fraudulent or as an attempt at fraud; but will be evidence simply to go to the jury with all the other evidence of the oaths, sayings, and acts of the party in the case charged therewith, from which the jury will find a verdict of what the motives or intentions of the party making them were, and if the jury find that the motive or intention was to defraud, or that thereby an attempt was made at fraud the general verdict in a case like these at bar would be for the defendants, otherwise for the plaintiff, and a charge to the jury that to swear falsely as to the price paid or manner of paying for the goods insured, is false swearing or an attempt at fraud within the meaning of the policy, takes the whole question of fact from the jury and is manifest error, for which a new trial should be granted.

JOHN B. SANBORN,
Of Counsel.

JOHN B. & W. H. SANBORN,
Att'ys for Pl'ffs in Error.

110-87.

FILED
OCT 15 1883
JAS. H. McKENNEY, CLERK
OFFICE SUPREME COURT U.S.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

HORACE B. CLAFLIN *et al., Plaintiffs in Error,*

(No. 290) *v.*

THE COMMONWEALTH INSURANCE COMPANY, OF BOSTON, MASS., *Defendant in Error.*

HORACE B. CLAFLIN *et al., Plaintiffs in Error,*

(No. 291) *v.*

THE WESTERN ASSURANCE COMPANY OF TORONTO, CANADA, *Defendant in Error.*

HORACE B. CLAFLIN *et al., Plaintiffs in Error,*

(No. 292) *v.*

THE FRANKLIN INSURANCE COMPANY OF ST. LOUIS, MISSOURI, *Defendant in Error.*

BRIEF FOR DEFENDANTS IN ERROR.

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Counsel for Defendants in Error.

West Publishing Co., Printers and Stereotypers, St. Paul, Minn.

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The court was clearly right in refusing the instructions requested by the plaintiffs, and in the instructions given to the jury.

FIRST.

The brief for the plaintiffs in error contains certain statements and assumptions of fact, of which some are at variance with the record, and as to others the record is silent.

1. On page 1, they say that Murphy (to whom the insured, before loss, had assigned the policies,) "had purchased and taken possession of the goods with the consent of the respective defendants."

It nowhere appears of record that any such consent was asked or given, and the third paragraph of the answer (Record, p. 16, fols. 43–44) denies any but a sham and pretended sale from Mrs. Barritt (the insured) to Murphy, which was merely colorable, and part of a scheme for defrauding defendants.

2. On page 6, they say that "H. B. Claflin & Co. give credit to the merchant" (Murphy) "upon such statement," (*i. e.* the same statement said to have been made to the mercantile agency,) "and sell him a large amount of goods for which, after the loss has occurred, they take an assignment of the claim under the policy." And at the foot of the same page 6 they say that "the claims of Murphy under the policies for the damage by fire were duly assigned to his creditors, Claflin & Co."

On page 13 they say that the plaintiffs in error, H. B. Claflin & Co., "unfortunately relied on Murphy's statements to the mercantile agency, and sold him goods, in payment of which they received nothing. They now wait upon this court to learn whether a misrepresentation of Murphy, which he made with intent to deceive the plaintiffs, and thereby to obtain goods from them, and upon which they relied and acted to their injury, shall release these companies."

As to each of these statements it is enough to say that the record nowhere shows that Claflin & Co. ever sold any goods to Murphy upon any statement whatever, whether made to

them directly, or indirectly through the agency; or that Claflin & Co. ever sold him any goods at all. And it may safely be presumed that if it were true in fact, or if any attempt had been made at the trial to prove, that Claflin & Co. ever heard of the alleged statement of Murphy to the mercantile agency, or that any such statement had been made to them, or that Murphy had bought one dollar's worth of goods of Claflin & Co. or any one else on the strength of any such statement, or had made any purchases at all prior to the time (after the fire) when he made the false statements to the companies in his proofs and examination—these matters would not be (as they are) conspicuously absent from the record.

3. The same remarks apply to the statement on pages 7 and 8 as to the instructions given at former trials by Judges DILLON and NELSON, and especially to the statement that a verdict for plaintiffs on one of these trials was set aside, and a new trial granted, "because His Honor Judge MILLER conceived that Judges DILLON and NELSON erred upon the point now in controversy here." It would be an unheard of thing in the 8th Circuit for the associate justice of this court to set aside a verdict and grant a new trial in a cause that he had not tried, because he disapproved the rulings of the judge who did try the case. And unless the latter had been dissatisfied with the verdict, he assuredly would not have unqualifiedly granted a new trial, although, in deference to Judge MILLER's views, he might have reserved the question of a new trial to await the judgment of this court on this writ of error.

The history of the trials of the various suits mentioned appears on page 29 of the Record, in the unilateral stipulation which the court required of the plaintiffs before making a certificate of division. In the *first* suit (against the Mercantile Co.,) tried, as correctly stated by plaintiffs, before Judge DILLON, the defendant had a verdict, which has not

been set aside. In the *second* case (against the Northwestern National Co.,) tried before Judge NELSON, the plaintiffs had a verdict which was set aside and a new trial granted. In that stipulation, the plaintiffs stipulate that if Judge MILLER'S rulings in the three cases now before this court are upheld the defendants are to have judgment in all five cases. If these rulings are held erroneous, then these three cases, and the *second* case (that in which the plaintiffs had a verdict) are to be retried; but the *first* case (that in which the defendant had a verdict, on trial before Judge DILLON,) is not to be retried unless the circuit court shall at some future time order a new trial.

4. The passage, said to be a quotation from Judge DILLON'S charge in the first case, I shall refer to when replying to the plaintiff's argument.

5. The Record (p. 12, fols. 31, 32,) shows that Murphy's claim of loss in his proofs was $26,827.06, and that the loss as found by the arbitrators was $11,804.72. (Record, p. 13, fol. 35.)

SECOND.

The certificate clearly shows:

1. That Murphy, in his examination on oath under the policies, made statements that were false to his own knowledge. His knowledge of the falsity of his statements is evident from their character and from the motive assigned for making them.

2. That these statements were material. The record says that he gave false answers to "questions relating to the manner in which he had paid one Frances E. Barritt for said stock at the time of his alleged purchase thereof," and that he made these false statements "for the purpose of showing himself, upon the examination, consistent with a statement that he had made about it a day or two subsequent to the purchase of said stock, to R. G. Dun & Co.'s commercial

agency at St. Paul, with a view of obtaining a large commercial credit in eastern cities." The record thus mentions the statement to the agency: "There was evidence tending to show that on the ninth day of February, 1877," (the day of the alleged sale from Mrs. Barritt to Murphy, and before the fire, which took place February 25, 1877,) "said William Murphy went to said agency, and reported that he had bought the stock of Frances E. Barritt for $35,484.20; that he had paid for the same in cash and securities."

The instruction requested goes on the theory that Murphy made the statement to the commercial agency "for the purpose of obtaining more credit than he was actually entitled to," and that his false statements on his examination "were made for the purpose of protecting himself against the statements made by him to the commercial agency."

This "consistency" and "protection" could be secured only by telling the same story to the companies that he had told to the agency. Just wherein the story to the agency and the companies was false, and the extent of the falsehood, do not appear. But a false statement which would lead to a larger credit than he was entitled to, must have related to something else than the mere manner of paying for the stock. The stock being bought and paid for on the same day, the manner of the payment would be immaterial and could have no bearing on the buyer's credit. The falsehood to the agency must have related to the amount of the price paid, or the fact of payment at all, or the fact of the sale, if not to all of these. It being for the plaintiffs to see that the certificate stated just wherein the falsehood to the agency and companies consisted, if they have left that doubtful, the court must assume that the whole statement was false, and that Murphy had certainly not paid any thing for the goods, and had probably not bought them at all.

Now whether Murphy had bought the goods, or whether the alleged sale was pretented, colorable and a sham, had an

important bearing on the question of Murphy's title to the goods, and on the question of the good faith of Murphy and those concerned with him, and on the truthfulness of his statement as to the value of the goods and the amount of the loss. A sham and pretended purchase of the entire stock in bulk would operate to enable Murphy to recover for goods he did not own, and impose on the companies a claim in excess of the actual loss, for it would shut out the companies from means of information they would have a right to require, had the sale not been made—viz.: the books of Mrs. Barritt and the original invoices (or copies) rendered her by the persons from whom she bought the goods. As the court knows, all policies give the companies the right to require the insured to produce his invoices and books; and this court has held in *Insurance Companies* v. *Weide*, 9 Wall. 677, that the entries of purchases in the day-book of the insured, shown by parol to be correct, are competent evidence upon the question of the value of a stock of goods destroyed by fire. On an actual sale, "*venditor vendit quam maximo potest; emptor emit quam minimo potest*," and the price paid, if not in itself the best criterion of value, is competent and valuable evidence on that question; whereas the nominal price on a sham sale, especially on a sham sale made as part of a scheme to defraud insurance companies, would probably be far in excess of the value of the goods.

At the trial of a suit on these policies, in which the alleged sale to Murphy was in issue in the pleadings, and Murphy had produced a formal bill of sale, and testified as to the fact of sale, it would certainly be proper for the defendant's counsel to ask him, (in the words of Judge MILLER, in denying a new trial in these cases,) "'Where did you buy them? What did you pay for them? Whom did you buy them of? Where did you get the money to buy them with? How did you pay for them?'—All these questions go to the proof of whether it was a fraudulent sale or not, and to show who was

the real owner of the goods." And if these would be proper, because material, questions on cross-examination at a trial, they were material questions in an examination under oath under the policies. Such an examination is necessarily in the nature of a cross-examination, and the companies have a right to truthful answers to whatever questions "have any legitimate bearing upon the inquiry what was the actual loss sustained in consequence of the fire." *Insurance Companies* v. *Weides*, 14 Wall. 375. They have a right to truthful answers to "any questions by which the defendants could fairly estimate or reasonably infer plaintiffs' real loss in the insured property." Id. p. 382. In the language of Judge MILLER, "The question of the ownership of these goods is manifestly one of the utmost materiality, and one great question in this case; and the company had a right to know of Mr. Murphy all the truth as to the ownership of these goods. * * * The company had a right to know of Mr. Murphy all about that question of ownership."

3. That Murphy by these statements intended to deceive and mislead the companies, to their damage and to his own advantage.

His intention to deceive is a necessary inference from his knowledge of the falsity of the statements. "When one has made a false representation, knowing it to be false, the law infers that he did so with an intention to deceive." *Per* Shepley, C. J., in *Hammatt* v. *Emerson*, 27 Me. 308.

And the passages cited from the certificate show affirmatively, without the aid of presumption or inference, that Murphy intended to deceive the companies.

He intended that his statements should be believed by the companies. If, as plaintiffs in effect say, he feared that the discovery of the falsity of his statements to the agency would harm him in some way, that injury would follow from any discovery by the company of the falsity of his statements,

whether that discovery was made to them by Murphy himself or was effected in any other way. And therefore when he made his statements under oath, he wished and intended to prevent the companies from discovering the truth in regard to the alleged sale of the stock, and the pretended payment for it, by inducing them to take his statement as true, and refrain from such further inquiry elsewhere as might expose its falsity.

And Murphy intended to damage the companies, for he intended to deprive them of that truthful information which was material and valuable to them, and which, under his contract with them, and under the oath he had taken, he was bound to give them. The information and the right to the information being of value to the companies, the violation of the right, and the giving of false information, were a legal and a moral wrong, and inflicted a damage upon the companies.

And Murphy thus intended to deceive and damage the companies in order to secure a benefit to himself, viz.: protection from harm by reason of the discovery of the falsity of his former statement to the commercial agency. This motive of personal gain, though wholly immaterial upon the question of his fraudulent intent, (see cases *infra*,) yet operates to aggravate the fraud of which it is not an essential ingredient.

It is true that the certificate states that there was evidence tending to show that Murphy made his false answers "with no purpose to deceive or defraud the insurance companies," and the first request refused assumes that they were made "not for the purpose of deceiving and defrauding the defendants," and the second instruction refused is to the effect that Murphy's false answers are not a defence "unless you are satisfied from the evidence that Mr. Murphy made them knowingly and wilfully, with intent thereby to deceive and

defraud the defendants." But, as has been shown, it affirmatively appears that Murphy did intend to deceive (and thus defraud) the companies: and the context of these extracts shows that the words "intention" and "purpose" are used for "motive," and that all that is meant is that Murphy's *motive* was a desire for self-protection from his former statements and not a desire to injure the companies. Although, as he could only protect himself by deceiving and thereby defrauding and injuring the companies, it is difficult to see how Murphy is put in any better case by the statements quoted.

The distinction between Murphy's *intention* and his *motive* is indicated in the following extract from the instruction given: "If he stated that which was intended for their action, and which would probably influence their action, and these statements were false, then he swore falsely within the meanof the policy, though he didn't intend to cheat them, but intended to cheat somebody else; for, *without looking to his motives*, the company had a right to an honest statement from him to all questions that went to show whether he was the owner of the goods or not."

In *Sleeper* v. *N. H. Fire Ins. Co.*, 56 N. H. 401, and *Leach* v. *Republic Fire Ins. Co.*, 58 N. H. 248; (*s. c.* 9 Reporter, 181; 21 Albany L. J. 97,) where the insured knowingly exaggerated his loss, his conduct was held fraudulent and a bar to a recovery, notwithstanding the statement that he had no intention to defraud the company.

The distinction between *intention* and *motive* is well stated and the way in which the terms are often confounded in popular speech is well illustrated in the following passages from Sir J. F. Stephen's recent "History of the Criminal Law of England," vol. 2, pp. 110 *et seq.* The italics are my own.

"INTENTION. I have already pointed out the place which intention occupies in voluntary action. It is the result of

deliberation upon motives, and is the object aimed at by the action caused or accompanied by the act of volition. Though this appears to me to be the proper and accurate meaning of the word, it is frequently used and understood as being synonymous with *motives*. It is very common to say that a man's *intentions* were good when it is meant that his *motives* were good, and to argue that his *intention* was not what it really was, because the *motive* which led him to act as he did was the prevailing feeling in his mind at the time when he acted rather than the desire to produce the particular result which his conduct was intended to produce. This confusion of ideas not unfrequently leads to failures of justice. That it is a confusion may be shown by illustrations. A puts a loaded pistol to B's temple and shoots B through the head deliberately and knowing that the pistol is loaded and that the wound must certainly be mortal. It is obvious that in every such case *the intention* of A must be to kill B. On the other hand, the act in itself throws no light whatever on A's *motives* for killing B. They may have been infinitely various. The *motive* may have been a desire for revenge or a desire for plunder, or a wish on A's part to defend himself against an attack by B, or a desire to kill an enemy in battle, or to to put a man already mortally wounded out of his agony. In all these cases the *intention* is the same, but the *motives* are different, and in all the intention may remain unchanged from first to last, whilst the motives may vary from moment to moment.

"This account of the nature of intention explains the common maxim, which is sometimes stated as if it were a positive rule of law, that a man must be held to intend the natual consequences of his act. I do not think the rule in question is really a rule of law further or otherwise than as it is a rule of common sense. The only possible way of discovering a man's intention is by looking at what he actually did, and by considering what must have appeared to him at the time the natural consequence of his conduct.

"The maxim, however, is valuable as conveying a warning against two common fallacies, namely, the confusion between motive and intention, and *the tendency to deny an immediate intention because of the existence, real or supposed, of some ulterior intention*. For instance, it will often be argued that a prisoner ought to be acquitted of wounding a policeman with intent to do him grievous bodily harm, because his intention was not to hurt the policeman, but only to escape from his

pursuit. This particular argument was so common that to inflict grievous bodily harm with intent to resist lawful apprehension is now a specific statutory offence; but, if the difference between motive and intention were properly understood, it would be seen that when a man stabs a police constable in order to escape, the wish to resist lawful apprehension is the *motive*, and stabbing the policeman the *intention*, and nothing can be more illogical than to argue that a man did not entertain a given *intention* because he had a motive for entertaining it. *The supposition that the presence of an ulterior intention takes away the primary immediate intention is a fallacy of the same sort.* It is well illustrated by a case reported in the State Trials, (*Rex* v. *Woodbourne and Coke*, 16 St. Tr. 54,) in which Woodbourne and Coke were indicted under the Coventry Act for wounding Crispe, 'with intent to maim and disfigure' him. Woodbourne, at Coke's instigation, struck Crispe about the head and face with a bill-hook seven distinct blows. Coke (who it has been said was 'a disgrace to the profession of the law') defended himself on the ground that he intended Woodbourne to kill Crispe, and not to disfigure him; but the judge who tried the case (Lord Chief Justice King) pointed out to the jury that the instrument used (a bill-hook) was 'in its own nature proper to cut and disfigure; and, if the intention was to murder, you are to consider whether the means made use of to effect and accomplish that murder, and the consequence of those means, were not in the intention and design of the party; whether every blow and cut and the consequence thereof were not intended, as well as the end for which it is alleged the blows and cuts were given."

THIRD.

As the certificate shows that Murphy made statements on material points in his examination on oath, which were known to him to be false, it shows an attempt on his part to deceive the companies, and an attempt to deceive in such a case is an attempt to defraud, for the fraud consists in the deception practised or attempted.

It is an elementary doctrine that a material representation or statement false to the knowledge of the person making it

is fraudulent; and if it is acted on, and loss ensues, then for that fraud and damage an action lies.

Kerr on Fraud and Mistake, 55.
Bigelow on Fraud, 62, 63, 84.
Cooley on Torts, 500, 501.
1 Story Eq. Jur. § 192.
Pomeroy on Contracts, 292–3.

That such a representation is fraudulent is a necessary conclusion from these two propositions:

1. "Where one has made a false representation, knowing it to be false, the law infers that he did so with an intention to deceive."

Hammatt v. *Emerson*, 27 Me. 308, per Shepley, C. J.

2. "Fraud means an intention to deceive."

Lord v. *Goddard*, 13 How. 198, *per* Catron J.

And in the two classes of cases where the question of what constitutes a fraud has been oftenest before the courts of law—viz., actions for deceit in representations of the credit or solvency of a third person, and actions for deceit in the sale of property—these propositions and the conclusion resulting from them have been often reiterated. A few instances will suffice.

"Knowledge of the falsehood of the thing asserted is fraud and deceit. * * * Knowledge of the falsehood of the thing asserted constitutes fraud." *Pasley* v. *Freeman*, 3 Term Rep. 51, (2 Sm. Lead. Cas. 97,) per Buller, J.

"If a party takes it upon himself wilfully to tell what he knows to be untrue, he is guilty of a legal fraud." *Thom* v. *Bigland*, 8 Exch. 725, *per* Parke, B.

"If the representation is false to the knowledge of the party making it, this would in general be conclusive evidence

of fraud." *Omrod* v. *Huth*, 14 M. & W. 651, per Tindal, C. J.

In *Corbet* v. *Brown*, 8 Bing. 33, Alderson, J., says: "The question is whether from the statement's being false within the defendant's own knowledge, the court must not infer fraud?" and it was held that the court must draw that inference.

In *Smout* v. *Ilbury*, 10 M. & W. 1, (a case of alleged fraudulent representation by defendant that he had authority as an agent,) Alderson, B., instances a man "who has made some statement which he knew to be false" as a man who has been "guilty of some fraud."

In *Moens* v. *Heyworth*, 10 M. & W. 147, Parke, B., while holding that a *moral* fraud should be shown, says that what the plaintiff should prove is "a representation, by words or acts, of that as being true which was known to the defendants to be untrue."

And see *Polhill* v. *Walter*, 3 B. & Ad. 114, per Lord Tenterden, C. J.

Lobdell v. *Baker*, 1 Met. 193; S. C. 3 Met. 469.
Stone v. *Denny*, 4 Met. 1.
Holmes v. *Clark*, 10 Iowa, 423.

"A recommendation known at the time to be untrue would be deemed fraudulent." *Russell* v. *Clark*, 7 Cranch, 69, *per* Marshall, C. J.

"If he (the vendor) knows it (the representation) to be false, that is fraud of the most positive kind." *Smith* v. *Richards*, 13 Pet. 26, 38, *per* Barbour J.

Such being the rule of law in cases of representations of the solvency of a third person, or upon sales of property, where the parties deal at arms' length, and the law says to the buyer "*caveat emptor*," certainly a rule at least as stringent should apply to cases arising under contracts of insurance, which are "*uberrimæ fidei*."

FOURTH.

The circumstance that Murphy's sole or principal *motive* in attempting to deceive the companies by false statements may have been a desire "to be consistent" with his former falsehood to the commercial agency, and "to protect himself" from the consequences of a detection of that falsehood, does not take the case out of the rule established in the cases cited.

Ordinarily the law pays no regard to the motives by which men are impelled to do wrong, and cases of fraud are no exceptions to this doctrine.

In *Pasley* v. *Freeman*, it was argued that defendant was not liable for a knowingly false representation of the solvency of a third person, unless some collusion between the latter and the defendant, or some interest on defendant's part, were shown. But *Buller*, J., said: "The gist of the action is fraud and deceit, and if that fraud and deceit can be fixed by evidence on one who had no interest in his iniquity, it proves his malice to be the greater." And *Ashurst*, J., said: "The gist of the action is the injury done to the plaintiff, and not whether the defendant meant to be a gainer by it. What is it to the plaintiff whether the defendant was or was not to gain by it? The injury to him is the same."

And so in *Haycraft* v. *Creasy*, 2 East, 92, *Le Blanc*, J., says, (p. 108:) "By fraud I understand an intention to deceive. Whether it be from any expectation of advantage to the party himself, or from ill-will towards the other, is immaterial."

Foster v. *Charles*, 6 Bing. 396, S. C. 7 Bing. 105, is also directly in point. The action was for damages for deceit in recommending an agent. At the first trial the defendant had a verdict, which was set aside. (See 6 Bing. 396.) At the second trial, *Tindal*, C. J., told the jury that if the defendant made the representations knowing them to be false, and intending thereby to benefit himself, that was fraud in the

common acceptation of the term; and if he made them, knowing them to be false, without proposing thereby any advantage to himself, but proposing, perhaps, to benefit a third person, he was guilty of fraud in the legal acceptation of the term, and liable, etc. The jury found for the plaintiff for £800 damages, but added to the verdict this statement: "We consider there was no actual fraud on the part of the defendant and that he had no fraudulent intention, although what he has done constituted a fraud in the legal acceptation of the term."

The defendant contended that this amounted to a verdict in his favor, and moved that the verdict be entered for him. The motion was denied by the whole court. *Tindal*, C. J., said that "the jury, in finding that he had no intention to defraud, mean only that he was not actuated by the baser motive of obtaining an advantage for himself, but that he was guilty of a fraud in law by stating that which he knew to be false, and which was the cause of loss to the plaintiff. The question, therefore, is whether, if a party makes representations which he knows to be false, and occasions injury thereby, he is not liable for the consequences of his falsehood? It would be most dangerous to hold that he is not. The confusion seems to have arisen from not distinguishing between what is fraud in law and the *motives* for actual fraud. It is fraud in law if a party makes representations which he knows to be false and injury ensues, though the *motives* from which the representations proceeded may not have been bad."

In *Polhill* v. *Walter*, 3 B. & Ad. 114, a bill was presented for acceptance at the office of the drawee in his absence. The defendant, who lived in the same house with the drawee, being assured by one of the payees that the bill was perfectly regular, was induced to and did write on the bill an acceptance as by the procuration of the drawee, believing that the acceptance would be sanctioned, and the bill paid by the drawee. The bill was dishonored when due,

and the indorsee, having failed in a suit against the drawee, sued the defendant for falsely, fraudulently and deceitfully representing that he was authorized to accept by procuration. Lord Tenterden left it to the jury to determine whether there was a fraudulent intention or not, and directed them to find for defendant if they thought there was no fraud, otherwise for plaintiff, with leave to plaintiff, etc. Verdict for defendant, which was set aside by the full court, on the ground that it was enough that the party making the representation knew it to be untrue, and it was intended or calculated to induce another to act on the faith of it to his damage; and that it is not necessary to prove that the false representation was made from a corrupt motive of gain to the defendant, or a wicked motive of injury to the plaintiff: and *Foster* v. *Charles* was cited and approved.

Polhill v. *Walter* is cited with approval by Curtis, J., in *Philadelphia, etc., R. Co.* v. *Howard*, 13 How. 307, 336, where it is said: "When a party asserts what he knows is false or does not know to be true, to another's loss and his own gain, he is guilty of a fraud; a fraud in fact if he knows it to be false, fraud in law if he does not know it to be true."

Suppose the converse of this case. Suppose that Murphy had falsely stated to an insurance agent that he had bought and paid for this stock, and had procured insurance on the faith of the statement; and afterwards, being asked by one from whom he is about to buy goods whether he owns the stock and has paid for it, he says that he has, and thereupon goods are sold to him; and he makes this statement fully intending to pay for the goods and confident of his ability to do so. There could be no question that whether for the purposes of a civil remedy, or in a criminal prosecution, the representation to the seller would be deemed fraudulent. And the case supposed is not so strong as the present, for here Murphy had never obtained any goods on the faith of his statement to the commercial agency.

And in many cases of actions for false representations as to a third person's pecuniary means, the motive of the defendant in making a representation known to be false is not to injure the plaintiff, but merely to benefit the third person. But such representations are not the less fraudulent though proceeding from this benevolent motive, and though made in the belief that the plaintiff would not be a loser by relying and acting on them.

FIFTH.

Even if we are wrong in our well-fortified position that Murphy's motive is immaterial,—even if the court should be of opinion that Murphy's statement, though false to his own knowledge, was not fraudulent unless made from the sordid motive of benefiting himself, or the wicked motive of injuring the companies, still the action of the circuit court was right, for the record shows the existence of both these motives.

The evidence as to Murphy's purposes shows that his motive was to secure a benefit to himself—viz: protection from the consequences of a discovery of the falsity of his statement to the agency. He meant to obtain this—he could only obtain it—by injuring the companies, depriving them of information which was of value to them and which he had agreed to give them. It is not a good argument for plaintiffs to say that Murphy never meant to obtain more than the actual loss. This would of course mean no more than his estimate of the loss. Such an estimate by the insured, even when honestly made, is pretty sure to be exaggerated, (in this case exaggerated from $11,804.72 to $26,827.06,) and, even if not exaggerated, the insured has no right to make himself the sole judge of what he ought to receive, and deprive the companies of the right of testing his estimate by means of the examination provided in the policies. Suppose that the insured, with a view to recover only his actual

loss, but expecting that the company will attempt to cut down by one-half any claim he may make, should knowingly state his loss in his proof and his examination at double the true amount. Such a statement would clearly be fraudulent, (see *Leach* v. *Republic Fire Ins. Co.*, 58 N. H. 248; S. C. 9 Reporter, 181; 21 Albany L. J. 97; *Sleeper* v. *N. H. Fire Ins. Co.*, 56 N. H. 401,) and a bar to a recovery.

It seems to be conceded that if Murphy had not made the false statement to the agency, his false statement on his examination would have been fraudulent and a bar to a recovery. The argument is that because Murphy had made a false statement to a commercial agency that had not been acted on by anybody, therefore he could with impunity repeat his false statement when examined by the insurance companies, and such a repetition of the false statement would not be fraudulent, though the statement would be fraudulent if made for the first time on the examination. In other words, a man who has once told a lie is priviledged to repeat that lie when and where he pleases, and possesses a dispensing power over the rules of morality and law, and over the conditions of his contracts, which is denied to others who have not taken the proper steps to acquire this franchise of deceiving insurance companies without prejudice to recovery on their policies.

SIXTH.

Nothing in the numerous cases cited by plaintiffs militates against the positions taken by the defendants.

People v. *Cook*, 8 N. Y. 67, 79, merely decides that irregularities on the part of inspectors of election are not evidence of fraud.

Castleman v. *Griffin*, 13 Wis. 535, merely decides that a binding contract for the sale of land is not avoided by subsequent false statements of the vendor.

Marsh v. *Falker*, 40 N. Y. 562, *Chester* v. *Comstock*, 40 N. Y. 575, *Stitt* v. *Little*, 63 N. Y. 427, *Lord* v. *Goddard*, 13 How. 198, *Lord* v. *Colley*, 6 N. H. 99, were actions for damages for fraudulent representations as to the solvency of third persons.

Some of those cases hold that it is not enough to show that the representation was false, but the plaintiff must also show that it was made with intent to deceive, but none of them hold that the intent to deceive is not, and some of them hold that it is, necessarily involved in the making of a statement known to be false.

Thus, in *Chester* v. *Comstock*, the court, *per Woodruff*, J., say: "Actionable fraud, consisting in a false representation, imports, *ex vi termini*, an intent to deceive. It may be committed by stating what is known to be false. It may be committed by professing knowledge of the truth of a statement which is untrue. But, in either case, falsehood uttered with intent to deceive are the essential ingredients."

In *Stitt* v. *Little*, the court (p. 431) hold the charge of the court below to be erroneous in not requiring plaintiff to show "that the representation was known by the party making it to be false, and was made with intent to deceive." And on page 432, the court approve the general rule, established in former cases, that such an action "cannot be maintained without proof that the defendant believed or had reason to believe, at the time when he made the representations, that they were false, *and consequently* that they were fraudulently made."

Lord v. *Goddard* and *Lord* v. *Colley* merely hold that an honest statement of opinion believed to be true is not to be presumed fraudulent merely because it happens not to be true. The court in *Lord* v. *Goddard*, (already cited by the defendants,) say that the action cannot be maintained "without proving actual fraud in the defendant or an intention to deceive."

Oberlander v. *Spiess*, 45 N. Y. 175, *Lefler* v. *Field*, 52 N. Y. 620, and *Stafford* v. *Newson*, 9 Ired. (Law) 507, were actions for damages for deceit in sales of property. *Oberlander* v. *Spiess* holds (pp. 177–8) that plaintiff must show "that the defendants believed or had reason to that the representations were false at the time, *and for that reason* that they were fraudulently made." *Lefler* v. *Field* merely holds that the complaint must not merely aver that the representations were false, but that they were made "with intent to deceive."

Stafford v. *Newson* holds that "the action for deceit rests in the intention with which a representation is made, or a fact not mentioned. It was not sufficient that the representation should be *calculated* to mislead—for that may be done by the most honest communication—but the representation must be made with intent to deceive. Moral turpitude is necessary to charge a defendant in an action for deceit."

In the Insurance Cases cited by the plaintiffs, the principal point decided is that a material misstatement of the value of the goods on hand or of the amount of the loss will not avoid a policy unless made fraudulently, and that a material discrepancy between such statement and the amount found by the jury is not of itself proof that the statement was not honestly made.

In *Marion* v. *Great Republic Ins. Co.*, 35 Mo. 148, the court charged, at defendant's request, to the effect that a material misstatement of the loss in the proofs, knowingly made, would defeat a recovery, and the supreme court approves this instruction and disapproves another instruction (which was refused) because it differs from that given.

In *Planters' Mut. Ins. Co.* v. *Deford*, 38 Md. 382, the case turned on the construction of the statement of value in the proofs, the court holding that the statement "stock in tannery, hides and leather $56,500," might well refer to other stock besides hides and leather. It is to be observed that the *first* and the *tenth* instructions requested by defendant (pp. 385,

388) were conceded by plaintiff and given by the court, and are not questioned on the appeal, (see plaintiff's argument, 392,) and that there is a manifest clerical error in the last paragraph of the opinion as to the *tenth* instruction. These *first* and *tenth* instructions are to the effect that a false statement in the proofs as to the amount of the loss or of the stock on hand, known when made to be false, will defeat a recovery though the loss exceeded the insurance.

Gerhauser v. *North British Ins. Co.*, 7 Nevada, 174, holds a false statement, to work a forfeiture, "must be wilfully made with respect to a material matter, and with the purpose to deceive the insurer," and that the discrepancy between the insured's statement of his loss ($6,000) and the amount of the verdict ($3,000) is not even conclusive of an overestimate, still less of a fraudulent overestimate, "although there may be cases so glaring that the disproportion will amount to proof of fraud."

In *Clark* v. *Phœnix Ins. Co.*, 36 Cal. 168, the court hold that the discrepancy between the amount of loss ($1,250) stated in the proofs and the amount ($1,100) found by the jury is entitled to no weight, and say that "the discrepancy must be such as to show *a material* and *intentional* overvaluation on the part of the plaintiff, before a jury would be justified in convicting him of fraud and perjury." In *Unger* v. *People's Fire Ins. Co.*, 4 Daly, 96, the court say that to establish a fraudulent overstatement in the proofs, it must be shown "that there were no such goods of such value destroyed, and that the insured knew or must have known the fact when they swore to the preliminary proof of loss"—*i. e.* that the insured's knowledge of the falsity of his statement is enough to make the statement fraudulent.

In none of those cases, nor in any well-considered case, is there any intimation that a material statement or representation, false to the knowledge of the person making it, is not a fraudulent statement; nor any intimation that an inten-

tion to deceive by means of such a statement is not a fraudulent intention, irrespective of the *motives* which led to the intended deception, or the ulterior design intended to be effected by means of the intended deception; nor any intimation that the making of a material representation with knowledge of its falsity does not necessarily involve an intention to deceive, by means of such representation, the person to whom it is made.

SEVENTH.

With reference to the passage on pages 7 and 8 of the plaintiff's argument, said to be a quotation from Judge DILLON's charge on the trial of a suit growing out of this loss, the first italicized passage on page 8, in its natural and obvious meaning, is not law, and involves the same confusion pointed out in the passage quoted from Stephen's History. In the last paragraph of the quotation, the rule of law is correctly stated, and in accordance with our contention here.

GEO. B. YOUNG,
STANFORD NEWEL,
Counsel for Defendants in Error.

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110-82

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

H. B. CLAFLIN & CO., *Plaintiffs in Error*,
v.
THE COMMONWEALTH INS. CO., OF BOSTON.
No. 50.

H. B. CLAFLIN & CO., *Plaintiffs in Error*,
v.
THE WESTERN ASSURANCE CO., OF TORONTO, CANADA.
No. 51.

H. B. CLAFLIN & CO., *Plaintiffs in Error*,
v.
THE FRANKLIN INS. CO., OF ST. LOUIS, MO.
No. 52.

JOHN B. SANBORN,
Counsel of Plaintiff in Error.

JOHN B. & W. H. SANBORN,
Attorneys.

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THE FRANKLIN INS. CO., OF ST. LOUIS, MO. — No. 52.

The Court, through Mr. Chief Justice Waite, made the following announcement and order:

These suits were begun in a state court of Minnesota, by the present plaintiffs in error, citizens of New York,

against the several defendants, corporations of Massachusetts, Canada, and Missouri, respectively, upon policies of fire insurance issued to Frances E. Barrett, and by her assigned, with the consent of the companies, to William Murphy. After a loss, Murphy assigned his claims against the several companies under the policies to the plaintiffs. The suits were removed by the defendants to the circuit court of the United States for the district of Minnesota. The record shows sufficiently that the plaintiffs and defendants were citizens of different states, but the citizenship of Murphy, the assignor of the plaintiffs, is nowhere stated. The question is therefore presented, whether the circuit court had jurisdiction of the suits. This question was not alluded to by counsel either in their oral or written arguments. As it is one we do not feel authorized to overlook, counsel will be heard upon it either orally, or by printed arguments, as may best suit their convenience, at any time they may desire on or before the third Monday in December next.

November 5, 1883.

TRUE COPY.

Test: JAMES H. McKENNEY,
Clerk U. S. Supreme Court.

The statutes upon which jurisdiction depends in this class of cases, are as follows, viz.:

SECTION 1. That the circuit courts of the United States shall have original cognizance, concurrent with courts of the several states, of all suits of a civil nature at common law, or in equity where the matter in dispute exceeds, ex-

clusive of costs, the sum or value of five hundred dollars, and arising under the constitution or laws of the United States, or treaties made, or which shall be made under their authority, or in which the United States are plaintiffs or petitioners, or in which there shall be a *controversy between citizens of different states*, or a controversy between citizens of a state and foreign states' citizens and subjects, and shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the district courts of the crimes and offenses cognizable therein. But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court. And no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process, or commencing such proceedings, except as hereinafter provided, *nor shall any circuit or district court have cognizance of any suit founded on contract in favor of any assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made*, except in cases of promissory notes negotiable by the law, merchant and bills of exchange. And the circuit courts shall also have appellate jurisdiction from the district courts under the regulations and restrictions prescribed by law.

SECTION 2. That any suit of a civil nature at law or equity now pending, or hereafter brought in any state court, where the matter in dispute exceeds, exclusive of

costs, the sum or value of five hundred dollars, and arising under the constitution or laws of the United States, or treaties made, or which shall be made under their authority, or in which the United States shall be plaintiff or petitioner, *or in which there shall be a controversy between citizens of different states*, or a controversy between citizens of the same state claiming lands under grants of different states, or a controversy between citizens of a state and foreign states' citizens or subjects, *either party may remove said suit into the circuit court of the United States for the proper district;* and when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit to the circuit court of the United States for the proper district.

SECTION 6. That the circuit court of the United States shall in all suits removed under the provisions of this act, proceed therein as if the suit had been originally commenced in said circuit court, and the same proceedings had been taken in such suit in said circuit court as shall have been had therein in said state court prior to its removal.

Laws of 1875. Statutes at Large, vol. 18, pp. 470, 471.

Hence, the simple question presented by the record upon the jurisdiction is, whether the inhibition upon suits brought by assignees of choses in action, of the first section of the act of 1875 is applicable to all suits and actions

in the circuit courts, or only to those brought there originally, as provided in that section. If the question was new it would seem to be free from doubt. For the English language is not capable of a broader and plainer inhibition than that contained in the following words: "*Nor shall* ANY circuit or district court have cognizance "of ANY suit founded upon contract, in favor of an as- "signee, unless a suit might have been prosecuted in "such court to recover thereon if no such assignment "had been made."

The circuit, and all the federal courts, being courts of limited jurisdiction, the laws confering jurisdiction must be strictly construed, and unless clearly conferred by congress, the laws will construe that it has not been granted at all, and does not exist. It becomes one of those questions where to doubt is to construe. Now, it seems to be a fair construction of the act of 1875 to hold that the entire grant of jurisdiction to the circuit courts is contained in the first section of the act, and that the grants and limitations of that section run through and govern the whole act, so far as jurisdiction is conferred thereby. And all subsequent sections and provisions prescribe methods of procedure, manner and form of exercising the jurisdiction conferred by the first section of the act.

The decisions of the courts in the cases of Bushnell *v.* Kennedy, 9th Wallace 137, Gaines *v.* Fuentes et al. 2 Otto, p. 10, Bliven *v.* New England Screw Co., 3 Bl. C. C., 111, Barney *v.* Globe Bank, 5 Bl.. C. C. 107, and other cases, are not and the reasoning upon which they stand is not applicable to the act of 1875. That the construction given

by the courts of the acts of 1789 and 1867 in the above cases went to the extreme verge of liberality, is fully manifested by the vigorous disents in Gaines *v.* Fuentes et al. as well as in the deduction that a grant and investiture of jurisdiction had been made by congress in a section of the law that related and pertained almost if not entirely to modes of procedure to vest jurisdiction granted in a previous section. But in all these cases the right to remove and jurisdiction were sustained, because it was not unreasonable to suppose and infer that the purpose of congress was to give a defendant citizen of a different state from that of the plaintiff, the right to trial in the courts of a country of which both or all parties are citizens, or in case of local prejudice in courts further removed from such prejudice. But, under the act of 1875, there is no ground for inference. The plaintiff, as an assignee of a chose in action, for no valid reason or for unworthy motives, to put a defendant to trouble and needless expense it may be, or to delay and annoy, desires to proceed in the federal courts. But the congress has denied to these courts original jurisdiction in such a case, clearly showing its purpose and policy.

Now, is the construction to be that, although original jurisdiction is prohibited, yet an indirect method has been provided whereby jurisdiction may be vested, and that which a plaintiff or party may not do directly, he may under the same act of congress, do indirectly? But congress has signified its purpose, its intention, by providing what may be done directly, and inhibiting all other jurisdiction. It seems absurd to hold that the act provides that plaintiffs of a certain class may come into the

federal courts by any door, and a certain other class only by the back door. This cannot be the sense of the law, even if it be the words. It is not the words of the law, but the internal sense of it, that makes the law; the letter of the law is the body, the sense and reason of law is the soul. Every statute ought to be expounded, not according to the letter, but according to the meaning; *qui hæret in litera, hæret in cortice:* "The enlarged interpretation of a law will penetrate the soul and spirit of a law and reach the intent and meaning of a legislature."

Eyston *v.* Studd, Plowdon.
Potter's Dwarris on Statutes, etc., p. 175.
Wernbish *v.* Tailbois, 1 Plowden, pp. 57, 58.
Stradling *v.* Morgan, 1 Plowden, p. 205.

The fair legal construction of the act of 1875 extends the inhibition of section one—the section that confers, grants jurisdiction, to the whole act; and requires that all the following sections be construed in its light and under its limitations. Section two is *in pari materia* with section one, and hence when the plaintiff has brought his suit as assignee of a chose in action in a state court against a citizen of another state, removal to the circuit court under the act of 1875 will not vest jurisdiction in that court unless the court would have had jurisdiction if the case had been brought there originally—unless the record shows that all prior parties were citizens of a different state from the defendant.

This is the construction given this act by the circuit court of the ninth circuit.

Berger *v.* The County Commissioners of Douglass County, 2 McCrary, p. 483.
Harden *v.* Oleson, 14 Federal Reporter, 705,
Levy *v.* Lachele Bank, Federal Reporter vol. 18, p. 193, No. 4, Nov. 1883.

While in the fifth circuit, the court, basing its decision on Bushnell *v.* Kenedy, has held the other construction.

Waterberry & Co. *v.* The City of Laredo, 3 Woods, C. C. Reports, 373.

The judgments should therefore be reversed and the causes remanded to the state courts.

JOHN B. SANBORN,
Counsel of Plaintiff in Error.

JOHN B. & W. H. SANBORN,
Attorneys.

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OFFICE SUPREME COURT U. S.
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

HORACE B. CLAFLIN *et al.*, *Plaintiffs in Error*,

(No. 50) *v.*

THE COMMONWEALTH INSURANCE COMPANY, OF BOSTON, MASS., *Defendant in Error*.

HORACE B. CLAFLIN *et al.*, *Plaintiffs in Error*,

(No. 51) *v.*

THE WESTERN ASSURANCE COMPANY OF TORONTO, CANADA, *Defendant in Error*.

HORACE B. CLAFLIN *et al.*, *Plaintiffs in Error*,

(No. 52) *v.*

THE FRANKLIN INSURANCE COMPANY OF ST. LOUIS, MISSOURI, *Defendant in Error*.

Argument on the Question of Jurisdiction.

GEO. B. YOUNG,
Counsel for Defendants in Error.

West Publishing Company, Printers, St. Paul, Minn.

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THE FRANKLIN INSURANCE COMPANY OF ST. LOUIS, MISSOURI, *Defendant in Error*.

ARGUMENT ON THE QUESTION OF JURISDICTION.

In each of these causes, the plaintiffs, as assignees of one Murphy, brought suit in a Minnesota state court on a policy of fire insurance issued by defendant ~~to Murphy~~.

The defendant, on entering its appearance, removed the action to the U. S. circuit court, under the act of March 3, 1875.

The record in each case shows the Claflins to be citizens of New York, and the citizenship of the defendant to be as appears by the titles of the cases, *supra*. But in none of them does the record show the citizenship of Murphy, the assignor.

The question raised by the court, and to which this argument is directed, is: Does the record show jurisdiction?

The answer depends on the meaning and effect of the restriction at the end of the first section of the act of 1875, and which is not found in the second section. A like restriction contained in the 11th section of the judiciary act, and absent from the 12th, has been construed in the cases that will be cited; and, for convenience of comparison, we print side by side the corresponding provisions of the two statutes.

JUDICIARY ACT OF 1789. 1 Stat. 78.	ACT OF MARCH 3, 1875. 18 Stat. 470, [Supp. to Rev. St. 173.]
§ 11. "The circuit courts shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and * * * an alien is a party, or the suit is between a citizen of the state where the suit is brought and a citizen of another state. * * *	§ 1. "The circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and * * * in which there shall be a controversy between citizens of different states * * * or a controversy between citizens of a state and foreign states, citizens or subjects. * * *
"And no civil suit shall be brought before either of said courts against any inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ; nor shall any district or circuit court have cognizance of	"And no civil suit shall be brought before either of said courts against any person, by any original process or proceeding, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceeding, except as hereinafter provided;

any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange."

§ 12. "If a suit be commenced in any state court against an alien, or by a citizen of the state in which the suit is brought against a citizen of another state, and the matter in dispute exceeds the aforesaid sum or value of five hundred dollars, exclusive of costs, to be made to appear to the satisfaction of the court; and the defendant shall, at the time of entering his appearance in such state court, file a petition for the removal of the cause for trial into the next circuit court to be held in the district where the suit is pending * * * and offer good and sufficient surety for his entering in such court, on the first day of its session, copies of said process against him, and also for his there appearing and entering special bail in the cause, if special bail was originally requisite therein, it shall then be the duty of the state court to accept the surety, and proceed no further in the cause, and any bail that may have been originally taken shall be discharged, and, the said copies being entered as aforesaid in such court of the United States, the cause shall there proceed in the same manner as if it had been brought there by original process.

nor shall any circuit or district court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange."

§ 2. "Any suit of a civil nature, at law or in equity, now pending or hereafter brought in any state court, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and * * in which there shall be a controversy between citizens of different states * * or a controversy between citizens of a state, foreign states, citizens or subjects, either party may remove said suit into the circuit court of the United States for the proper district; and when in any suit mentioned in this section, there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit to the circuit court of the United States for the proper district."

The act of 1875 being an enlargement of the judiciary act, following its lines as far as they go, and the same restriction being found in the same situation and in nearly the same words in each act, it is proper in the first place to determine the meaning of the restriction in the earlier act.

In attempting to do so, we shall state (1) what seems to us to be true construction of the restriction, and our reasons for it, and (2) the construction heretofore placed upon it by the courts.

I.

We think the restriction is to be construed as if it read, "Nor shall any circuit court have cognizance, in favor of an assignee, of any suit to recover the contents of any promissory note or other chose in action, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made." This is a less elegant and not more perspicuous arrangement than that in the act. We do not offer it as an improvement, but to emphasize our point.

Our reasons for this construction are found (1) in the language of the restriction; (2) in the purpose of its framers.

It is evident that the words "in favor of an assignee" do not qualify "promissory note," etc.; it is not a "promissory note in favor of an assignee," at which the restriction is aimed. The words mean nothing. A promissory note is in favor of the payee, and an assignee of it is an assignee of a promissory note in favor of A. B., payee.

Nor were the words intended to qualify the word "suit." A suit between the assignee and maker of a promissory note is not a suit "in favor of the assignee." A suit, like a battle or other controversy, may, perhaps, be said to favor one party or the other during its progress. The judgment is in favor of one party or the other, but the suit, while in progress, cannot be said to be in favor of either. A suit founded on the assignment of a promissory note must either be brought by the assignor (in his own name alone, or expressly "for the use" of the assignee,) or by the assignee. In the former case, the assignor being plaintiff on the record, the jurisdiction must depend on *his* citizenship, and this restriction is not needed. If the framers of the act meant to use the expression "suit in favor of an assignee," they

must have used it as meaning "suit by an assignee," and, considering the great ability and legal learning, and the great care and skill in the use of language and in the structure of the sentences, manifest everywhere in this statute, the framers of it, if they had meant to deny to the circuit courts jurisdiction of any "suit by an assignee to recover the contents of a promissory note," would have used those words and in that order. It would have been a more concise, direct and elegant way of expressing their meaning.

But if they had used this form of expression, the restriction would have *prima facie* included suits removed by the defendant as well as those brought originally in the circuit court, and it would have been at least proper, if they did not intend to embrace such removed suits in the restriction, to have expressed that intention by some proviso in the 12th section. Those masters of the law and of language were perfectly aware of this, and hence they adopted the language actually used, to prevent any question as to the application of the restriction to any section but the 11th.

Again, while, strictly speaking, the jurisdiction of a court over suits does not depend on any suits being brought, (the admiralty jurisdiction of the district court in a state without navigable waters and in which no libel is ever filed being the same with that exercised in the southern district of New York,) a court does not have "cognizance" of a suit until it is brought into the court, and it takes and has cognizance of it in favor of the party who brings the suit into the court, and thereby asks the court to entertain it. Ordinarily the plaintiff does this. He comes into court and *producit sectam;* and this act is the first that ever provided for the bringing of a suit, by a defendant, into the court of a sovereign by removal from the court of another sovereign. But a suit thus removed not being brought into the federal court by the plaintiff, the court does not have cognizance of it at his request, but at that of the defendant, and it has cognizance in favor of the defendant.

A plaintiff brings his suit in the circuit court and asks

the court to take cognizance of it, and, if the requisite conditions exist and appear, the court takes and has cognizance of it in his favor. But, if he be assignee of a promissory note, the court is forbidden to take cognizance of it in his favor, unless a suit could have been prosecuted by the assignor, if no assignment had been made. On the other hand the assignee brings his suit in the state court. The state court takes cognizance of it in his favor. The defendant removes the cause, and asks the circuit court to take cognizance of it. And the circuit court, taking cognizance of it, does so at the request and in favor of the defendant—not in favor of the plaintiff—the assignee—as to whom the removal of the cause from a court of his own choosing, and the cognizance of it, at the request of the defendant, by a court of his choosing, are proceedings *in invitum*.

The object of the restriction was to prevent suits founded on assignments made for the express purpose of giving jurisdiction. If the framers of the act had used the words "any suit by an assignee," they would have effected more than they intended, for they would have deprived the defendant, sued by an assignee, of the right of removal, unless the assignor could have sued in the federal courts. This was not a mischief to be guarded against, and so sweeping a provision would have denied the defendant a right given by the 12th section to all other defendants sued in the courts of a state other than their own by a citizen of that state,—and have denied it by reason of no fault of his own, but because of an act of the plaintiff; an act, too, which the fact of his suing in the state court showed was not done with the sinister purpose which the act disapproved. And the use of the words "by an assignee" would have made it necessary, for preventing this undesired and undesirable result, to mar the symmetry of the 12th section by some saving clause to restrict the restriction to those suits by original process which form the subject of the 11th section. And their avoidance of the words "by an assignee," and their use of the words "in favor of an assignee," shows that they intentionally re-

jected the simpler and used the more cumbrous expression that the restriction might plainly include those suits only which were brought in the circuit court by an assignee, by original process.

This construction of the restriction, if given to the act of 1875, would save to defendants—and to defendants in these cases—the right of removal, and would effectually prevent the mischiefs, real or supposed, that would result from allowing an assignee to bring in the state court a suit he could not bring in the federal court under the first section, and then remove it under the second.

II.

But the meaning we have given to the words "in favor of an assignee," though it seems to us the natural and only proper one, is not the ground upon which the courts have based their construction of the restriction; and as the question is not *res integra*, and the defendants' right to remove these suits is abundantly sustained by authority, we do not feel justified in resting their case wholly on the construction suggested, without support from the authorities.

In *Green* v. *Custard*, 23 How. 484, Custard, a citizen of Texas, brought suit by attachment against Green, a citizen of Massachusetts, in a Texan court. Green, on entering his appearance, obtained an order for removal. The original cause of action was a judgment, but, after the removal, the plaintiff amended by setting forth an entirely new cause of action, to-wit, a note of Green, payable to Arthur or order, and transferred without endorsement to plaintiff. The circuit court held the judgment a nullity, and remanded the cause, for want of jurisdiction of the cause of action on the note. This court, speaking by *Grier*, J., reversed the judgment, saying (p. 487):

"The conclusion that the court had no jurisdiction to proceed further, and the order to remand the case to the state court to try the other half of it, is a clear mistake for which

the judgment must be reversed. If Green had been a citizen of Texas, and Custard had claimed a right, as indorsee of a citizen of Texas, to bring his suit in the courts of the United States, because he (Custard) was a citizen of another state, the case would have occurred which is included in the proviso to the 11th section of the act, which restrains the jurisdiction of the court. But the United States court had jurisdiction of this case by virtue of the 12th section. It is a right plainly conferred on Green, a citizen of Massachusetts, when sued by a citizen of Texas, in a state court of Texas, *no matter what the cause of action may be*, provided it demand over five hundred dollars. *The exception of the 11th section could have no possible application to the case.*"

It will be noticed that this case, if begun in the circuit court, like some others that will be referred to, would be within that other restriction in the 11th section which forbids a suit being brought before the circuit court "against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ."

In *Bushnell* v. *Kennedy*, 9 Wall. 387, the Kennedys, citizens of Louisiana, as assignees of Mills & Frisbie, sued Bushnell, a citizen of Connecticut, in a Louisiana court. The defendant was personally served with process, and, on entering his appearance, removed the cause. The record did not show the citizenship of Mills & Frisbie. The circuit court remanded it, and the defendant brought the order to this court by writ of error. The court, by *Chase*, C. J., decline to decide whether the suit was one "to recover the contents of a chose in action," or "to determine definitely the true construction of the restriction," and say:

"We think that the jurisdiction of the circuit court over the cause before us can be well supported on the 12th section. That section, as we have already stated, provides for the removal of suits by defendants. The restriction in the 11th section is not found in the 12th. Nor does the reason for the restriction exist. In the 11th section its office was to prevent frauds upon the jurisdiction, and vexation of defendants, by assignments made for the purpose of having suits

brought in the name of assignees, but in reality for the benefit of assignors. In the 12th it would have no office, for the removal of suits could not operate as a fraud on jurisdiction, and was a privilege of defendants, not a hardship upon them.

"It is true, indeed, as was said in argument, that the section provides that, after removal, 'the cause shall then proceed in the same manner as if it had been brought by original process;' but we cannot recognize the validity of the inference that the defendant, before pleading in the circuit court, may move to dismiss the suit for want of jurisdiction. This construction would enable the non-resident defendant in a state court to remove the suit against him into a circuit court, and then, by a simple motion to dismiss, defeat the jurisdiction of both courts. Such a construction, unless imperatively required by the plain language of the act, is wholly inadmissible. And it is clear that the language of the act does not require it. Its plain meaning is that the suit shall proceed, not that it shall proceed unless the defendant moves to dismiss. The defendant is not in court against his consent, but by his own act, and the suit is to proceed as if brought by original process, and the defendant had waived all exception to jurisdiction, and pleaded to the merits. *Under the 11th section, the exception to jurisdiction is the privilege of the defendant*, and *may be waived*, for the suit is still between citizens of different states, and the jurisdiction still appears in the record. The first act of the defendant, indeed, under the 12th section is something more than consent, something more than a waiver of objection to jurisdiction; it is a prayer for the privilege of resorting to federal jurisdiction, and he cannot be permitted afterwards to question it. *Sayles* v. *N. W. Ins. Co.*, 2 Curtis, 212.

"We cannot doubt, therefore, that the circuit court had jurisdiction of the case under consideration. *We are all of opinion* that the court erred in remanding the cause to the jurisdiction of the state court, and the order to that effect must be reversed."

In regard to this case, we remark

1. The court expressly declares that it is unanimous. "We are all of opinion."

2. It was decided without reference to *Green* v. *Custard*, and apparently that case was not brought to the notice of the

court. Hence the two cases represent the independent conclusions of the court that decided the first, (Taney, C. J., McLean, Wayne, Catron, Daniel, Nelson, Grier, Campbell, and Clifford, JJ.,) and the court that decided the second, (Chase, C. J., Nelson, Clifford, Swayne, Miller, Davis, Field, Strong, and Bradley, JJ.,) but two judges sitting in both of the cases, and the second decided independently of the first.

Greater authority cannot be adduced in this court in support of any proposition than the authority of these cases in support of the position that the restriction in the 11th section did not prevent the removal of a cause under the 12th.

3. In *Bushnell* v. *Kennedy* the court bases its judgment on two grounds:

(*a*) The restriction of the 11th section is not to be read as a part of the 12th because (1) it is not found there, and (2) there is no occasion to import it thither, a removal not being within the mischief to be prevented.

(*b*) The restriction upon suits by assignees, like that upon suits by original process in districts other than that in which the defendant resides or is found, is a personal privilege of the defendant, and may be waived by him, even in case the suit were brought by original process.

This view is somewhat inconsistent with the construction uniformly given by this court to the provision (in section 16) "that suits in equity shall not be sustained in either of the courts of the United States in any case where plain, adequate and complete remedy may be had at law." At the same time, however, it cannot be denied that this restriction like the other, instituted, as it was, at a time when there was no likelihood that the circuit courts would be overworked in their legitimate business, was mainly if not wholly imposed for the protection of defendants—was not a denial of jurisdiction, but a grant of a privilege to the defendant. So far as the court is concerned, it can make no difference whether the plaintiff or defendant is the party having the right to bring

the suit into it, or whether it is brought by original process or by removal. And it has been uniformly held that the restriction upon suits against defendants not inhabiting or found within the district where the suit is brought is waived by a general appearance and plea to the merits. *Jones* v. *Andrews*, 10 Wall. 327, 332; *Gracie* v. *Palmer*, 8 Wheat. 699; *Toland* v. *Sprague*, 12 Pet. 300.

Under the judiciary act, a question arose, under the 12th section, where a foreign corporation, which was not an inhabitant, and, from the nature of its being, could not be found, in the state and district where it was sued in a state court, by process of attachment, appeared in the state court for the sole purpose of removing, and then did remove, the cause to the circuit court, and there moved to dismiss for want of jurisdiction. The court (*Curtis*, J.) said:

"*The jurisdiction over this case does not depend on the 11th, but on the 12th section of the act. If it be a suit which that section authorized the defendant to remove, it empowers this court to take jurisdiction of it when removed.* The question, therefore, really is whether the suit was rightly removed."

The court goes on to hold that to allow the defendant to remove the suit, and then have it dismissed, because it could not have been originally brought in the circuit court, would defeat the attachment laws of the state; that the defendant may waive his right to be sued only in the district where he is an inhabitant or is served with process, and does waive it by entering his appearance and removing the suit, and adds:

"The defendant comes in, becomes the actor, treats the suit as one properly instituted, removes it to another court, and enters it there, and then says he was not obliged to appear at all, and the state court, in effect, had no suit before it. This, I am of opinion, he cannot do." *Sayles* v. *N. W. Ins. Co.*, 2 Curtis, 212, (A. D. 1854.)

In a precisely similar case in New York, decided in 1853, it was urged that the circuit court had no jurisdiction, because it would have had none if the suit had been commenced there. But *Nelson*, J., replied:

"This did not follow logically or legally. *The suit had been brought into this court from a court which had jurisdiction of it, and in such a case I know of no exception to the rule that this court has jurisdiction.* Unless this be so, a foreign corporation must be deprived of the benefit of the 12th section; because, if a case be instituted in a state court which has jurisdiction of it, and be transferred to this court, and this court, on looking into it, finds the defendant to be a foreign corporation, and therefore decides against its own jurisdiction, it follows that this court can do nothing but remit the case to the court from which it came and which has jurisdiction." *Bliven* v. *N. E. Screw Co.* 3 Blatch. 111, affirmed 23 How. 423,

——where, however, no point was made against the jurisdiction.

And in *Barney* v. *Globe Bank*, 5 Blatch. 107, the same question was decided in the same way by *Shipman*, J., on the ground that "*the validity of this removal is to be tested by the 12th instead of the 11th section of the act in question.*"

Thus far there is nothing in the *judgments* of the courts that stands in the way of the construction we have suggested, (and which is consistent with either view of the restriction here in question, viz., that it is a denial of jurisdiction, or a personal privilege of the defendant,) although the grounds on which the judgments are placed are inconsistent with that construction, since they assume that the words mean "suits by assignees" and construe them to mean merely suits by original process. But the decisions under the act of 1867 go farther, and it is necessary to state the provisions of that act, and the construction of it prior to 1875, to complete our picture of the state of the law as to removals and the settled construction of this restriction at the time of the passage of the act of 1875. By the act of March 2, 1867, commonly known as the "Prejudice and Local-Influence Act," (14 Stat. 558,) it is provided:

"That where a suit is now pending or may hereafter be brought in any state court, in which there is controversy between a citizen of the state in which the suit is brought and

a citizen of another state, and the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs, such citizen of another state, whether he be plaintiff or defendant, if he will make and file in such state court an affidavit, stating that he has reason to and does believe that, from prejudice or local influence, he will not be able to obtain justice in such state court, may at any time before the final hearing or trial of the suit, file a petition in such state court for the removal of the suit into the next circuit court," etc.

After provisions for offering surety and requiring the state court to proceed no further, the act provides that upon the entry of the copies of the record in the circuit court, "the suit shall there proceed in the same manner as if it had been brought there by original process."

As observed by *Miller*, J., in *Johnson* v. *Monell*, 1 Woolw. 390, (A. D. 1869,) this act "works very important changes in the principles heretofore governing the right of parties to remove causes from the state courts into the federal courts. For the first time it allows a plaintiff to remove the suit from the tribunal of his own selection." In that case the plaintiff claimed the removal after the parties, citizens of the state in which the suit was brought, had litigated it in the state court to a jury trial, a verdict and an order granting a new trial. The citizenship on which plaintiff founded his right was obtained by his own voluntary change of residence after all this had been done. And the court well says: "This is such a wide departure from the restrictions by which congress had heretofore guarded the right of removal, and the proposition that a party instituting the litigation in the state court, and pressing it to the point here mentioned, can, by his own voluntary change of residence, acquire the right to remove the cause from the forum of his own selection is so startling, that nothing short of the clearest evidence that congress had both the power and the intention to grant such a right, will justify this procedure." But notwithstanding the novelty and startling character of the proceeding, the court did not hesitate to give effect to the plain and unmistakable language of the act as expressing the plain and un-

mistakable intention of congress to do the very thing which was so novel and so startling.

At the December term, 1871, the case of *City of Lexington* v. *Butler*, (14 Wall. 282,) was decided in this court, involving the construction of the restriction in question, and its application to suits removed under the act of 1867.

In that case Butler brought suit in a state court of Kentucky against the city of Lexington, upon coupons of bonds issued by it. The bonds were payable to the Lexington & Big Sandy R. R. Co., or order, and were endorsed payable to bearer. The coupons were payable to bearer. Before trial, the plaintiff removed the cause into the circuit court, where he had judgment. The defendant removed the case to this court by writ of error, and contended that the circuit court had no jurisdiction, as the case was within the restriction of the 11th section of the judiciary act.

The court held that bonds and coupons endorsed to bearer are not in any case within the restriction; and then proceeded—as they would not have done, if they had had the least doubt on the subject—to hold that the restriction has no application to suits removed. Speaking by *Clifford*, J., the court says:

"Suppose, however, the rule is otherwise, still the objection must be overruled, as the suit was not originally commenced in the circuit court. Suits may properly be removed from a state court into the circuit court in cases where the jurisdiction of the circuit court, if the suit had been originally commenced there, could not have been sustained, *as the 12th section of the judiciary act does not contain any such restriction as that contained in the 11th section of the act, defining the original jurisdiction of the circuit courts.* Since the decision in *Bushnell* v. *Kennedy*, 9 Wall. 387, all doubt upon the subject is removed, as it is there expressly determined that *the restriction incorporated in the 11th section of the judiciary act has no application to cases removed into the circuit court from a state court; and it is quite clear that the same rule must be applied in the construction of the subsequent acts of congress extending that privilege to other suitors not embraced in the 12th section of the judiciary act.*"

And they go on to state that, though this plaintiff could not have removed under the 12th section, yet that, as he is within the terms of the act of 1867, "*the jurisdiction of the circuit court in this case was beyond controversy.*"

In *Barclay* v. *Levee Commissioners*, 1 Woods, 254, decided in 1872, the same question arose, and the jurisdiction was of course sustained, the grounds of the decision being thus stated by *Bradley*, J.:

"The plaintiff contends that the act of 1867, which authorizes the removal of suits from a state court, either by the plaintiff or defendant, who shall make oath that he cannot have a fair trial on account of local prejudice and influence, overrides this provision of the 11th section of the judiciary act. And I am inclined to think that this position is correct. The provision referred to was intended to prevent fraudulent assignments of choses in action made for the mere purpose of giving the court jurisdiction, and was not founded on any constitutional principle. As the act of 1867 is general in its terms, and gives the right of removal in all cases without exception where the parties are citizens of different states, I do not think it necessary to import into it an exception grounded on the 11th section of the judiciary act."

III.

It remains to ascertain the meaning and effect of the restriction in the act of 1875. Looking merely at the language in which the restriction is expressed, the words used in the act of 1875 should have the same meaning they would have in the judiciary act of 1789. According to the construction we have suggested for the expression "nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note or other chose in action, in favor of an assignee," etc., in the earlier act, the expression, "nor shall any circuit or district court have cognizance of any suit founded on contract, in favor of an assignee," in the act of 1875, means that a circuit court shall not take cognizance, in favor of an assignee, of such a suit—that is, shall

not take cognizance of it at his instance, whether he brings it for cognizance by original process or removal—but is not restrained from taking cognizance of it in favor of the defendant, when he brings it into the court by removal from a state court.

This construction would fully sustain the jurisdiction of the court in these cases now before it, while it would apply the restriction to the second section, and prevent a removal by any assignee who was prevented by the restriction from bringing the suit by original process.

But there are reasons, which will be stated, why we cannot assert with confidence that the words were used in the act of 1875 in the sense we have given them, and the jurisdiction of this court over these suits, removed by the defendants, is abundantly sustained without resorting to this interpretation.

The decisions under the judiciary act show that, at the time of the passage of the act of 1875, it was the settled doctrine of the federal courts that the bringing of suits by original process in those courts, and the removal of suits to those courts, were regarded as entirely separate and distinct matters, so much so that enactments providing for the one were not *in pari materia* with enactments providing for the other—even though they were contained in successive sections of the same statute; and that any restriction on original suits in any statute or section has no application to suits removed from state courts under any other statute or section; or, as it is stated by Judge Dillon, "The jurisdiction of the circuit court is dependent upon the act under which the suit is removed, and not upon the legislation which confers jurisdiction upon that court in cases originally brought therein." Removal of Causes, 15. This was the settled conviction of the federal judiciary, a conviction having these essentials of an article of faith—*quod semper, ubique, ab omnibus receptum est*, and one to which they had been constant even under the test of the act of 1867. And under a familiar rule of interpretation, it would seem that the construction thus placed

by the courts upon the restriction of the judiciary act must be placed on the same words in the act of 1875.

And there are special reasons for applying this canon to the act of 1875. The framers of that act had the judiciary act before them. They evidently meant to re-enact its provisions, greatly enlarged and extended. They meant to give the circuit court all the jurisdiction conferred by the judiciary act, and as much more as the constitution would permit. And they were familiar with the construction which the courts had invariably placed on the restriction as to cognizance of suits in favor of assignees, and therefore knew that a restriction in the first section would not affect the second. This is evident from the substitution of "any suit founded on contract" for "any suit to recover the contents of a chose in action"—language which had given this court much trouble, and the meaning which so late as 1869, after they had been on the statute book 80 years, was still unsettled, and as to which the court says in *Bushnell* v. *Kennedy*, before cited, "it is not necessary now to determine definitely the true construction of the restriction." And accordingly, with this exception, when they used the language of the restriction of the 11th section, they did not select the words and form them in sentences to express an idea of their own. They took the whole sentence bodily to express the meaning which this court had placed upon it.

And when congress re-enacted the restriction, it would seem that they re-enacted it with the construction placed upon it in *Green* v. *Custard*, *Bushnell* v. *Kennedy*, and *City of Lexington* v. *Butler*, and not merely enacted the words of the restriction, but they enacted that those words should have the same meaning and effect—no greater and no less—that had been given them in those cases; that in determining the effect of the restriction in the act of 1875, the question is not, What would the words naturally mean in either act? but, What has congress enacted them to mean in the act of 1875? And it would seem that the answer must be looked for in *Bushnell* v. *Kennedy*; and that congress did not, by the

restriction of the first section of the act of 1875, intend to prevent the removal of any cause that was within the terms of the second section.

If congress had left the 11th section of the judiciary act to stand unchanged, but had substituted for the 12th the second section of the act of 1875, the case would be directly within *City of Lexington* v. *Butler*. And the re-enacting of the restriction in the first section gives it no greater effect on the second than if it had been left to stand without re-enactment.

The construction to be given, then, to the first and second sections would seem to be this:

1. No suit founded on contract is to be brought against a defendant by original process, by an assignee, unless his assignor could have brought it, if no assignment had been made.

This restriction is not a denial of jurisdiction, but a privilege of the defendant which he can waive.

2. A suit founded on contract, brought in a state court by an assignee, may be removed into the circuit court by either party, if it is between ~~certain~~ citizens of different states, without regard to the citizenship of the assignor.

This construction has already been placed on the act of 1875 by *Duval*, J., in *Waterbury* v. *City of Laredo*, 3 Woods, 371.

We do not see how any possible objection can be made to this construction, so far as affects a non-resident defendant, such as the defendants in these cases. Under the judiciary act and every other, any non-resident defendant, who, except for the restriction, could be sued in the federal court, might, if sued in a state court, remove the suit to the circuit court notwithstanding the restriction. The case is wholly outside the supposed mischief at which the restriction is directed.

And it would seem that no tenable objection can be made

to a removal even by the plaintiff. Grant that the provision is novel and startling; so was the provision in the act of 1867. And that act allowed a plaintiff to remove from a forum of his own choice, even after he had taken the chances of a trial.

If it be said that by the judiciary act, as well as that of 1867, a non-resident party could remove only when the other party resided in the district where the suit was brought, and presumably had a local prejudice and influence in his favor, and, under the latter act, the plaintiff, in order to remove, must make affidavit that "he has reason to and does believe that from prejudice or local influence, he will not be able to obtain justice in such state court," the answer is: 1. Under those acts an original suit would only lie where one party was a citizen of the state where it was brought; but under this act a suit may be brought by original process in any district where the defendant is found, though neither party is an inhabitant thereof. 2. The judicial power of the United States over "controversies between citizens of different states," is given because of the apprehension that in a suit in a state court one party or the other will be affected favorably or otherwise by local influence and prejudice, as well in a case where neither party is an inhabitant of the state, as in a case where one of them lives there. *Gaines* v. *Fuentes*, 92 U. S. 10, 19. 3. As to the affidavit, the constitution itself takes for granted that in all such cases there is reason to believe that one party or the other will suffer or profit by local prejudice or influence in a state court; and it is to be presumed that any suitor or defendant will believe what the constitution says he has reason to believe. And the fact of his removing shows that he expects to fare better in the federal than in the state court, and no plaintiff or defendant will confess that he wishes more than justice. And accordingly the affidavit presents no obstacle to the removal. It is like the untraversable averments of legal fictions in the King's Bench or Exchequer, to give jurisdiction to the court. In nearly every case it is treated as matter of course, and

suits are sworn away from the state to the federal court as readily as from one justice of the peace to another.

It may be said that the act thus construed allows a person to confer on another a right to sue in the federal courts that he does not himself possess; and that it permits a plaintiff to do indirectly what he could not do directly—or to accomplish by two steps what he could not by one. As to the first objection, a person could always confer such right of suit by an actual transfer of property to a citizen of another state, and this though a principal *motive* of the transfer was a desire to create a case cognizable in the federal courts. *McDonald* v. *Smalley*, 1 Pet. 620; *Barney* v. *Baltimore City*, 6 Wall. 280. So it was an every-day practice for a citizen of one state to remove to another state to become a citizen of the latter to enable him to sue in the courts of the United States; and if his removal was real, and not merely nominal, and he has truly become a citizen of another state, his motive for doing so was not a subject for inquiry. *Briggs* v. *French*, 2 Sumner, 251, quoted in *Johnson* v. *Monell*, Woolw. 390, 397–8.

The second objection lay as well to the act of 1867, and lies to other proceedings that may unquestionably be taken under the act of 1875. A plaintiff may not sue a non-resident by attachment in the federal court, but he may thus sue him in the state court and then remove the cause. This objection goes on the theory that no suit can or should be removed by a plaintiff that he cannot bring in the circuit court by original process. But the theory is not well founded. One whose goods are taken by a sheriff on an attachment or execution levy, as the goods of a third person, cannot bring replevin in the circuit court. But he may do so in the state court, and then remove the suit. And in such a case this court has held that "upon the question of removal, it is utterly immaterial whether or not the suit, as an original action, could have been maintained in the federal court." *Kern* v. *Huidekoper*, 103 U. S. 485, 492. And were this otherwise, it would, perhaps, not be easy to reconcile such cases as *Ran-*

dall v. *Howard*, 2 Black, 585, and *Nougue* v. *Clapp*, 101 U. S. 551, with *Gaines* v. *Fuentes*, 92 U. S. 10.

Objections based on supposed hardship to a defendant, or imposition on the court, seem equally untenable. If sued in the state of his residence, it cannot be said that a defendant is worse off when the assignee's suit against him is removed than he was while it was pending in the state court. If sued in another state where he is not personally served, the hardship of being dragged into a lawsuit away from home is imposed on him by the state law, and a suit cannot be thus begun against him in the circuit court. But when the suit is once in the state court, the plaintiff's removal of it imposes no additional hardship upon the defendant. In either of the cases supposed, the suit is to be determined by a tribunal whose fairness the constitution itself presumes will be beyond the reach of the suspicion that might attach to the state courts. The federal courts are not courts for residents or for non-residents, but for all alike. Any inconvenience that may result from their being held at wide intervals of space or time, the crowded state of their dockets and the consequent expense to suitors, is in legal contemplation, *damnum absque injuria*. The taxable costs are full compensation for the expense (*Day* v. *Woodworth*, 13 How. 363,) and this and the other grievances are not peculiar to suits founded on contract in favor of assignees, but affect all suitors alike. Those inconveniences are the necessary result of increasing the jurisdiction, without adding to the courts or judges. During the whole period they have existed, it has been at all times within the power of congress to apply an easy and simple remedy. And as a failure of duty cannot judicially be imputed to that body, it follows that congress has not remedied these supposed evils because it did not deem them serious enough to require its action.

As to imposition on the court. If the assignment is merely colorable, the circuit court will dismiss or remand the case. This was its duty before the act of 1875, (*Barney* v. *Baltimore City*, supra,) and that duty is emphasized by the 5th

section of the act. There would seem to be no more danger from colorable assignments of rights founded on contract, than from colorable sales or leases of land, in order to bring ejectment, or of chattels, in order to bring trover; or from colorable changes of residence in order to bring every kind of action—even such as *Williams* v. *Nottawa*, 104 U. S. 209, or *Hawes* v. *Oakland*, Id. 450. If the assignment is real, it is not easy to see how the court suffers by taking cognizance of the suit, just as it would of any other controversy between citizens of different states coming into it by removal from a state court having jurisdiction. And the restriction being found in juxtaposition with that upon suits in districts whereof the defendant is not an inhabitant, and in view of the decision in *Bushnell* v. *Kennedy*, and the purpose of the act of 1875 to augment jurisdiction, it is not easy to construe the restriction on suits by original process in that act as anything more than a personal exemption by the defendant, which he may waive without trenching on the rights of the court.

It is undoubtedly true that such a construction will bring into the federal courts suits not otherwise cognizable there, and for which there is scant room in their crowded dockets; and that hence delay and expense may result to the parties. This argument, like the others noticed, goes to show that congress ought not to increase the business of the federal courts without increasing the facilities for doing it. The avowed purpose of the act was to enlarge the jurisdiction, and thus increase the business of these courts, far beyond the limits fixed by former legislation, and to the verge of the judicial power of the United States. It may be that, like a famous prayer for rain, the act has proved efficacious beyond expectation or desire. This is a good reason why congress should apply a remedy, if one is needed, but does not warrant a court in refusing jurisdiction expressly given. And, indeed, the suits removed by assignees, on contracts other than negotiable notes and bills of exchange, and which were not already removable under the act of 1867, are probably but a bucket-

full in the flood of litigation that has poured into the circuit courts since the act of 1875 opened wide the gates, for the very purpose of inviting and admitting it.

And, after all, are not most of the objections to this jurisdiction more fanciful than real? Is there not a tendency on the part of their advocates to magnify the torments of unwilling litigants in the federal courts? Is it, in truth, so fearful a thing to fall into the hands of the circuit court of the United States? Does that court best serve the purposes of its creation by driving away suitors from its portals which congress has thrown wide open, lest, haply, entering, they leave hope behind? And is not too severe a denunciation levelled at the assignor and assignee, for their "fraud upon the jurisdiction," when the practice of which *Railroad Co.* v. *White*, 101 U. S. 98, is an example, is visited with a far milder censure?

We have found no cases holding that a defendant could not remove a suit like these. The only cases we have found holding that a plaintiff could not, are *Berger* v. *County of Douglas*, 5 Fed. Rep. 23, (S. C. 2 McCrary 483,) decided in 1880 by *McCrary*, J., followed by the same learned judge in two later cases. That case was rightly decided, as the requisite citizenship did not exist when the suit was brought in the state court, the assignment having been made *pendente lite*. The decision is not put on that ground, nor is that objection noticed. The reasoning of the court does not seem convincing. Sections 11 and 12 of the judiciary act are more than "somewhat analogous" to sections one and two of the act of 1875. The only case cited is *Bushnell* v. *Kennedy*, and the whole effect of that decision does not appear from the passage quoted. The reasoning is mainly *ab inconvenienti*, proper to be addressed to congress to induce a change in the law or an increase of federal courts and judges, but insufficient to overcome the force of the plain language of the act. The case was one eminently fit to be rejected by the court, and should have been on the ground above indicated, rather than on the doubtful grounds on which the order was in fact

based. In the later cases mentioned, the question does not seem to have been re-examined.

We have gone into the question raised more fully than was needed to sustain the jurisdiction in these cases, removed by the defendants; partly because the determination of any point of jurisdiction should be made upon a view of all and not merely a part of the entire subject-matter, and partly because of what seemed to us, if not an erroneous decision, yet a decision based on unsatisfactory reasons, made in the 8th circuit, on a question which the interests of all having business in the federal courts require should be finally settled. And we ask the indulgence of the court if we have overpassed a reasonable limit in our argument.

GEO. B. YOUNG,
Counsel for Defendants in Error.

18 * Page 1. Total No. pages in list, .

No. 23 A.

Revised March 20, 1879.

Page . Total No. pages in list, .

Alphabetical list of persons liable to tax under the internal-revenue laws of the United States, in the collection district of the of , reported by the collector of said district for assessment, and the amount assessed against each by the Commissioner of Internal Revenue and certified to the collector of said district for collection, for the month of , 187 .

1 No. of line.	2 Name.	3 P. O. address.	4 † Article or occupation.	5 Period.	6 Amount reported by collector. Dollars.	6 Amount reported by collector. Cts.	7 Remarks by collector.
1							
2	Carey, Dan'l M.	Gretna	16,189 gall. dist. spirits, @ 70c.	From Dec., 1874, to M'ch. 1875.			May list, 1875.
3	" " "	"	14,284 " " " @ 90c.	" M'ch 4, 1875, to Ap'l 14, 1875.			" " "
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No. of line.	8 Tax assessed. Dollars.	8 Tax assessed. Cts.	9 Penalty assessed. Dollars.	9 Penalty assessed. Cts.	10 Total [tax and penalty] assessed. Dollars.	10 Total [tax and penalty] assessed. Cts.	11 Unassessed penalties collected by collector. Dollars.	11 Unassessed penalties collected by collector. Cts.	12 Amount paid or abated. Dollars.	12 Amount paid or abated. Cts.	13 Date of payment or abatement.	14 No. of abatement order.	15 Serial No. special tax stamps.	16 Amount assessed on spirits stamps at 10 cents each. Dollars.	16 Amount assessed on spirits stamps at 10 cents each. Cts.	17 Remarks by commissioner.
1																
2	11,332	30														
3	12,855	60														
4																
5	24,187	90														
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*In all lists Form 23 A will comprise the first half of the first page and the second half of the last page.
Inside pages will be prepared on Form 23 B. The number of Forms 23 B to be inserted in a list of 1, 2, 3, 4, and 5 pages, respectively, is as follows:
In a list of one page, none.
In a list of two pages, one-half.
In a list of three pages, one.
In a list of four pages, one and one-half.
In a list of five pages, two.

† For the meaning of abbreviations used in this column see instruction No. 4, on title-page of this Form.

ADDITIONAL REMARKS BY COLLECTOR.

I certify that the foregoing is a correct abstract of the May list, 1875, showing assessments as made by the Hon. Comm'r of Int. Revenue, as made against Dan'l M. Carey.
(Signed) M. MARKS,
Collector Internal Revenue.
N. O., *May* 4, 1880.

I hereby certify that each of the persons above reported by me is liable to the tax set opposite his or her name, respectively.
Dated at ——, ——, 187 .
——— ———,
Collector of Internal Revenue, —— Dist. —— o ——.

I hereby certify that, as authorized and required by law, I have made inquiries, determinations, and assessments of the taxes specified in the foregoing list, and find to be due the amounts specified in columns 8 and 9 of said list from the persons against whose names said amounts are respectively placed.
(Sig'd) D. D. PRATT, *Commissioner.*
INTERNAL REVENUE OFFICE,
Washington, June 12, 1875.

3363——Face page 7.

[Revised March 20, 1879.]

UNITED STATES INTERNAL REVENUE.

Detailed list of persons in the _____ collection district of _____, from whom unassessed and unassessable penalties, interest, including interest on tax on spirits in distillery warehouses, taxes previously abated, conscience money, and deficiencies in bonded accounts have been collected; and also fines, penalties, and forfeitures paid to collector by order of court, or by order of the Secretary of the Treasury; amounts of penalties and interest received for validating unstamped instruments; and the amounts collected from each of such persons for the month of _____, 187 .

I, ——, ——, collector of the —— district of ——, do hereby certify that the following detailed list is complete in every particular, and embraces all collections made in said district, from the sources enumerated above, during the above specified period.

Dated this —— day of ——, 187—.

—— ——, *Collector.*

No. of line.	Name.	Location.	Description.	No. in abstract.	Amount
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PLEASE READ THIS.

NOTES.—Taxes and penalties imposed by section 3176 of the U. S. Revised Statutes (section 14, act of June 30, 1864, as amended), which should be assessed by the Commissioner of Internal Revenue, should not be reported on this form but on Form 23, even though the amounts thereof may have been collected prior to their assessment. Taxes twice abated, or abated after collection, should not be reported on this Form.

Entries in the column headed "Description" should be full and explicit. If there is not room enough in one line to insert a full description, two or more lines may be used. This column should show distinctly the nature of the collections made, and why made.

Unusual care is necessary in regard to penalties relating to special taxes. If a special tax, or other tax, previously abated, is entered on this Form, the fact of previous abatement should be stated.

When the collector receives money from the clerk of a court and reports only a portion of the amount receipted for on this list, he will state in the column headed "Description," the amount reported on previous lists, giving the amounts reported on each; and in case any portion of the amount receipted for should not be charged to him, he will state how much, and why he should not be charged.

The expression in the heading of the list, "and the amounts collected from each of such persons," means the amounts of unassessed penalties, interest, or other matters named only in the heading.

Care should be taken, in making up the "Duplicate" of Forms 58 and 23, that entries be made on lines corresponding with those on which the like entries are found in the "Original," otherwise inconvenience and delay may arise in the adjustment of claims for abatement or refunding.

Money deposited to the credit of the Secretary of the Treasury should not, while thus deposited, be reported on this Form. When transferred to the credit of the U. S. Treasurer, notice of the transfer will be given.

In reporting the collection of the five per cent. penalty and one per cent. interest in accordance with the provisions of sections 3184, 3185, and 3187, R. S., the collector will state on what assessments the collections are made.

On or before the 10th day of each month the collector will prepare a list on Forms 23 and 58, each in triplicate, for the entire district for the preceding month. The list on Supplemental Form 23 will not be required hereafter. The spirits stamps, other than tax-paid, will be paid for to the collector or deputy collector upon delivery to the parties who use them or for whom they are used. In case any stamps used during a given month are not paid for during the month, the collector will enforce payment in the following manner: He will demand payment from the distiller when the entry for deposit is made, and from the rectifier when the return on Form 45 is filed; and in case of neglect or refusal to pay for the stamps used (warehouse stamps or rectifier's stamps, as the case may be), he will report the delinquents for assessment on Form 23.

The entries on the lists will be made in accordance with the following instructions:

The collector will enter the amounts returned to him on Form 24 by his deputies; the amounts certified to him by the Commissioner on Forms A and C; the amounts returned by tax-payers directly to himself, and all other taxes liable to assessment under the internal-revenue laws. In each case every fact necessary to enable the Commissioner to assess and return the amounts to be collected should be specified in the proper columns, including column 7, of remarks. Each triplicate list will be a counterpart of the other two, except that the collector will mark across the top of one, in red ink, the word "Original," across the top of another the word "Duplicate," and across the top of the third the word "Triplicate." Form 23 should be made out alphabetically, without regard to article, occupation, or divisions. At the end of the list of names commencing with any given letter one line should be left blank, and in case the list is a large one two or three lines should be left blank.

Before sending the list to the Commissioner, the collector will make the entries on Form 23 in columns 2, 3, 4, 5, 6, and 7, and, in case a special tax is paid before the list is sent, in 12, 13, and 15, as follows:

1. Care should be taken that entries made on any one line of the original should be made on the corresponding line of the duplicate and triplicate.
2. The collector will enter in column 2 the names of all persons in his district liable to assessment, including those who have not paid for the spirits stamps chargeable at ten cents each, and those liable to the penalty of fifty per cent. for neglect to make return in due time, or of one hundred per cent. for making a false or fraudulent return (Form 11 of special-tax payers, Form 67 of banks or bankers, Form 106 of savings banks, &c.). In making up the list for May, he will enter the names of all persons who in May continue or commence a business rendering them liable to a special tax, and who have failed to pay the tax prior to June 1st. This must be done even when the tax is paid before the list is made up. And he will report every special-tax payer on the list for the month in which he commences business who fails to pay his tax prior to the first day of the succeeding month. In making up his lists for May and November of each year the collector will enter in column 2 of 23 A or 23 B the names of all banks and bankers in his district liable to assessments on circulation, and on 23 C or 23 D the names of all banks and bankers, with particulars, as directed on Form 23 C.
3. In giving the post-office address it is not necessary to state the county or township, but merely the post-office as found in the post-office directory, except in case the collection district is entirely comprised within the limits of a city, when the street and number will be given in lieu of the post-office address.
4. The article or occupation should be stated in full in column 4 when there is room. If there is not room the following abbreviations may be used, viz: "D." for dealer, "R." for retail, "L." for liquor, "W." for wholesale, "T." or "Tob." for tobacco, "Manuf." for manufacturer, "M." or "M'f'd" for manufactured, "L. T." for leaf tobacco, "M. L." for malt liquors, "M. T." for manufactured tobacco, "Brewer, (or rectifier,) less than 500 bbls." for brewer (or rectifier) manufacturing (or rectifying) less than 500 barrels per year, "Brewer, (or rectifier,) 500 bbls. or more," for brewer (or rectifier) manufacturing (or rectifying) 500 barrels or more per year. In case spirits stamps other than tax-paid stamps are reported, the number and kind will be stated, as "5 warehouse stamps," or "7 rectifier's stamps," as the case may be. Only one kind of stamp should be reported on one line. In the case of banks, assessments on capital and deposits will be reported on Forms 23 C and 23 D, the amount due on capital being entered in column No. 7 and the amount due on deposits in column No. 8.

   When an assessment is reported against a distiller on account of deficiency of spirits or excess of material in the production of distilled spirits, the words "Deficiency, Spirits," or "Excess, Spirits Material," as the case may be, will be entered. When an assessment is reported against a distiller, brewer, manufacturer of tobacco, snuff, or cigars, or other manufacturer, for having removed any taxable articles from his distillery, brewery, or manufactory, as the case may be, without the use of the proper stamp, or for not having duly paid such tax by stamp at the time and in the manner provided by law, the entry in this column should be "Stamp Tax Spts.," "Stamp Tax Tob.," "Stamp Tax Cigars," "Stamp Tax Beer," "Stamp Tax Medicine," "Stamp Tax Perfumery," as the case may be. The initials "S. T." may be used as an abbreviation for "Stamp Tax." When under section 5, act of March 1, 1879, the tax and interest on one or more packages of spirits in a distillery warehouse from which there has been an excessive loss is reported, the entry in this column will be "Gallon Tax Spirits."
5. In making entries in column 5 against the names of special-tax payers, the number of months for which the tax is due and the end of the special-tax year should in all cases be stated in the following manner: "5 mo. end'g Apr. 30, 1878," "12 mo. end'g Apr. 30, 1878," or as the case may be. In case of deficiency of spirits or excess of material in production of distilled spirits, the month or period during which the deficiency or excess occurred should be stated. In making entries in column 4 of Forms 23 C and 23 D against the names of banks and bankers, the full period for which the return on Form 67, Form 106a, or Form 106b is rendered should be stated as follows: "6 mo. end'g May 31, 1877," "6 mo. end'g Nov. 30, 1877," or otherwise, as the case may be.
6. The amount reported by the collector in column 6 should be the amount of the tax to be assessed. It is not necessary for the collector to state the amount of the fifty per cent. or one hundred per cent. penalty in this column. In case the tax so reported is paid prior to sending forward the list, the following entries should also be made on the list by the collector before the list is forwarded to the Commissioner, viz: The amount paid, including penalty, if any has been paid, in column 12; date of payment in column 13; and, if a special-tax stamp has been issued, the serial number of the stamp in column 15.
7. In the case of special taxes, the collector will state in column 7, of remarks, whether the return on Form 11, has been made, and, if made, the date when received, and whether true or false. As a penalty will be assessed in every case where a return on Form 11 is not made according to law, or the return is false or fraudulent, the necessity of making entry of these facts in each case is apparent.

   When the tax on brandy distilled from apples, grapes, or peaches, exclusively, is reported for assessment for default in the payment thereof (see page 93, Regulations, Series 7, No. 7, and Circular No. 193,) the words "Stamp Tax Spts," will be entered in column No. 4, and the words "Fruit Brandy" in column No. 7.

   When the tax and interest on spirits which have remained in a distillery warehouse more than three years is reported for assessment, or when the tax and interest on any cask or package in a distillery warehouse from which there has been an excessive loss of spirits (see section 5, act of March 1, 1879) is so reported, the serial numbers of the packages containing the spirits should be stated in column No. 7, or at the foot of the page under the heading "Additional Remarks by Collector." Interest under joint resolution of March 28, 1878, will be assessed with the tax.

   Letters containing explanations concerning items reported for assessment should be inclosed with the list on which the items are reported, and reference should be made to such letters in column 7; otherwise the explanations may not be received until after the list is made up and the "Original" forwarded to the collector.

   In reporting taxes the assessment of which is barred by the statute of limitation, the collector will obtain the necessary waiver on the return (see Circular Letter No. 4), forward the return with the list to the Commissioner, and report the fact in column 7.

The three copies of Form 23 and Form 58, prepared as above stated, will be disposed of as follows: Two copies, the "Original" and "Duplicate," will, on or before the 10th day of the month, be sent to the Commissioner, and one copy, the "Triplicate," filed in the office of the collector. In case the calculation of the deficiency taxes will, in any month, delay the transmission of Form 23 to the Commissioner beyond the 10th day of the month in which it should be sent, the collector will report the amount which he finds to be due on his next monthly list. He must not accept without question the amounts certified to him on Forms A, nor, when he has the proper data for calculating such assessments, should he await the arrival of Form A before making such calculation. In case no assessment is to be made the collector will send, but one copy of Form 23 and Form 58, and will write over his signature, in red ink, "I have no assessments to recommend for the month of ——, 187 ."

Collectors are earnestly requested to comply with the above instructions in the preparation of their assessment lists.

No. 23 A.

FORM REVISED MARCH 20, 1879.

ASSESSMENT LIST

FOR THE

Month of* ——, 187—,

*——, ——,
Collector,

*——district of——.

Receipted for—— —, 187—.

This list should never be folded; when transmitted by mail it should be rolled, not folded.

*The collector will make the proper entries in these blank spaces before forwarding the list to the Commissioner.

[Ed. 3-25-79—6,000.]

INSTRUCTIONS TO COLLECTORS RELATIVE TO FORM 23 AND FORM 58.

No list prepared by a collector will cover a less period than one calendar month. The last list prepared by an outgoing collector will be for the last full month of his term of office; and the first list of the incoming collector will be for the full calendar month during which he enters upon the duties of his office. The outgoing collector will certify to the new collector the assessments, advance collections, and amounts to be reported on Form 58 for those days of the month, in which he remained in office. And the new collector may take credit on his first report on Form 51, for the advance collections made by his predecessor.

The Commissioner will, immediately on the receipt of the lists on Forms 23 from the collector, inquire, determine, assess, and enter in columns 8, 9, 10, and 16 of Forms 23 A and 23 B, and in columns 9, 10, 11, and 12 of Forms 23 C and 23 D, the amounts ascertained to be assessable, including the amounts returned by the collector, if found correct. He will also enter at the foot of the list the amount assessed on Forms 23 C and 23 D and the amount reported by the collector on Form 58. The value of the spirits stamps other than tax-paid stamps at 10 cents each will be entered in column 16. In the case of special taxes, if the serial number of the stamp is not reported, the tax will be entered in column 8 and included in the amount to be receipted for on Form 23½. Amounts entered in column 16 will not be included in such receipt.

The list will then be sent to the collector, who will, on receiving and critically examining the same, receipt therefor on Form 23½, the original of which receipt will be sent to the Commissioner of Internal Revenue, the duplicate to the First Comptroller of the Treasury, and the triplicate will be securely attached to the copy of the list on Form 23 filed in the collector's office. The amount of this receipt will be taken up on Forms 51 and 79 in the same manner as was the case with receipts formerly given to the assessor on Form 23½. It is greatly to be desired that the number of receipts on Form 23½ be limited to twelve in each year, or one for each month, and care should be exercised to have each list on Form 23 as complete as possible when sent to the Commissioner; but any tax inadvertently omitted should be included in the list for the next month, with a note in column 7 briefly explaining the cause of delay. Failure to include in the next list any such amount will be deemed a gross neglect of duty by the collector so omitting the same. If the list for any given month transmitted to the collector is incomplete by reason of the assessment against any person or firm being too small, or by reason of an omission to make an assessment recommended in column 6, the name of the person against whom the collector desires the assessment to be made, with the proper amount stated in column 6, will be returned by him on the list for the following month.

If the collector inadvertently neglects to report an amount for assessment for any given month, the error will usually be remedied by reporting the amount on the list for the succeeding month. If, however, a month's delay would render the assessment invalid by reason of the 15 months' limitation, the collector will return the list and triplicate receipts for the month for which the assessment should be made, and the assessment will be made on the list so returned. In case the collector thinks that the amount certified to him on Form 23½ is incorrect by reason of an erroneous assessment, he will not state another amount in his receipt but will sign the receipt as certified, unless there should be an error in the footing up. In the latter case the collector should at once return the unsigned receipt with a statement showing the page and column in which the error is to be found, when, if the facts warrant, new triplicate receipts will be prepared showing the correct amount to be receipted for.

Erroneous assessments will be adjusted in the following manner: If too large, by claim for abatement; if the assessment is too small, or an amount is omitted which should be included, the deficiency or amount omitted should be reported for assessment on the next succeeding list.

Collectors are specially cautioned against leaving their deputies with too small a supply of Form 24, against making entries in columns 8, 9, 10, 16, and 17 of Form 23, and against confounding the monthly return on Form 23 with those made on Forms 51, 52, and 49.

On the list being returned by the Commissioner the collector will collect the amounts due, and fill up, in ink, at the time of payment, columns 11, 12, and 13. On payment of special tax, or other tax paid by a stamp, the collector will give only the special-tax stamp (or other stamp required) as receipt for the amount stated in column 8, and a special receipt only for the amount stated in column 9. In other cases he will give a special receipt for the amount stated in column 10. After giving the special-tax stamp the collector will enter the serial number thereof in column 15. When taxes are abated the collector will enter the amount abated in column 12, the date of abatement in column 13, and the number of the abatement order in column 14.

19 * Page 1. Total No. pages in list, .

No. 23 A.

Revised March 20, 1879.

Page . Total No. pages in list, .

Alphabetical list of persons liable to tax under the internal-revenue laws of the United States, in the collection district of the of , reported by the collector of said district for assessment, and the amount assessed against each by the Commissioner of Internal Revenue and certified to the collector of said district for collection, for the month of , 187 .

1 No. of line.	2 Name.	3 P. O. address.	4 † Article or occupation	5 Period.	6 Amount reported by collector. Dollars.	6 Cts.	7 Remarks by collector.	No. of line.	8 Tax assessed. Dollars.	8 Cts.	9 Penalty assessed. Dollars.	9 Cts.	10 Total [tax and penalty] assessed. Dollars.	10 Cts.	11 Unassessed penalties collected by collector. Dollars.	11 Cts.	12 Amount paid or abated. Dollars.	12 Cts.	13 Date of payment or abatement.	14 No. of abatement order.	15 Serial No. special tax stamps.	16 Amount assessed on spirits stamps at 10 cents each. Dollars.	16 Cts.	17 Remarks by commissioner.
1								1																
2	Carey, Dan'l M	Gretna	16,189 gals. dist'd spirits, @ 70c	From Dec., 1874, to M'ch, 1875			May list, 1875	2	11,332	30														
3	" " "	"	14,284 " " " @ 90c	" M'ch 4, 1875, to Ap'l 14, 1875				3	12,855	60														
4								4																
5								5	24,187	90														
6								6																
7								7																
8								8																
9								9																
10								10																
11								11																
12								12																
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29								29																
30								30																
31								31																
32								32																
33								33																
34								34																
35								35																

*In all lists Form 23 A will comprise the first half of the first page and the second half of the last page.

Inside pages will be prepared on Form 23 B. The number of Forms 23 B to be inserted in a list of 1, 2, 3, 4, and 5 pages, respectively, is as follows:

In a list of one page, none.
In a list of two pages, one-half.
In a list of three pages, one.
In a list of four pages, one and one-half.
In a list of five pages, two.

†For the meaning of abbreviations used in this column see instruction No. 4, on title-page of this Form.

ADDITIONAL REMARKS BY COLLECTOR.

I certify that the foregoing is a correct abstract of the May list, 1875, showing assessments as made by the Hon. Comm'r of Int. Revenue, against Dan'l M. Carey.

(Signed) M. MARKS,
Collector Internal Revenue.

N. O., *May* 4, 1880.

I hereby certify that each of the persons above reported by me is liable to the tax set opposite his or her name, respectively.

Dated at ——, ——, 187 .

——— ———,
Collector of Internal Revenue, —— Dist. —— of ——.

I hereby certify that, as authorized and required by law, I have made inquiries, determinations, and assessments of the taxes specified in the foregoing list, and find to be due the amounts specified in columns 8 and 9 of said list from the persons against whose names said amounts are respectively placed.

(Sig'd) D. D. PRATT, *Commissioner.*

INTERNAL REVENUE OFFICE,
Washington, June 12, 1875.

3365——Face page 8.

(58.)

[Revised March 20, 1879.]

UNITED STATES INTERNAL REVENUE.

Detailed list of persons in the collection district of , from whom unassessed and unassessable penalities, interest, including interest on tax on spirits in distillery warehouses, taxes previously abated, conscience money, and deficiencies in bonded accounts have been collected; and also fines, penalties, and forfeitures paid to collector by order of court, or by order of the Secretary of the Treasury; amounts of penalties and interest received for validating unstamped instruments; and the amounts collected from each of such persons for the month of , 187 .

I, ——, collector of the —— district of ——, do hereby certify that the following detailed list is complete in every particular, and embraces all collections made in said district, from the sources enumerated above, during the above specified period.

Dated this —— day of ——, 187—.

—— ——, *Collector.*

No. of line.	Name.	Location.	Description.	No. in abstract.	Amount.
1					
2					
3					
4					
5					
6					
7					
8					
9					
10					
11					
12					
13					
14					
15					
16					
17					
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21					
22					
23					
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25					
26					
27					
28					
29					
30					
31					
32					
33					
34					
35					

PLEASE READ THIS.

NOTES.—Taxes and penalties imposed by section 3176 of the U. S. Revised Statutes (section 14, act of June 30, 1864, as amended), which should be assessed by the Commissioner of Internal Revenue, should not be reported on this form but on Form 23, even though the amounts thereof may have been collected prior to their assessment. Taxes twice abated, or abated after collection, should not be reported on this Form.

Entries in the column headed "Description" should be full and explicit. If there is not room enough in one line to insert a full description, two or more lines may be used. This column should show distinctly the nature of the collections made, and why made.

Unusual care is necessary in regard to penalties relating to special taxes. If a special tax, or other tax, previously abated, is entered on this Form, the fact of previous abatement should be stated.

When the collector receives money from the clerk of a court and reports only a portion of the amount receipted for on this list, he will state in the column headed "Description" the amount reported on previous lists, giving the amounts reported on each; and in case any portion of the amount receipted for should not be charged to him, he will state how much, and why he should not be charged.

The expression in the heading of the list, "and the amounts collected from each of such persons," means the amounts of unassessed penalties, interest, or other matters named only in the heading.

Care should be taken, in making up the "Duplicate" of Forms 58 and 23, that entries be made on lines corresponding with those on which the like entries are found in the "Original," otherwise inconvenience and delay may arise in the adjustment of claims for abatement or refunding.

Money deposited to the credit of the Secretary of the Treasury should not, while thus deposited, be reported on this Form. When transferred to the credit of the U. S. Treasurer, notice of the transfer will be given.

In reporting the collection of the five per cent. penalty and one per cent. interest in accordance with the provisions of sections 3184, 3185, and 3187, R. S., the collector will state on what assessments the collections are made.

No. 23 A.

FORM REVISED MARCH 20, 1879.

ASSESSMENT LIST

FOR THE

Month of ——, 187—,

*—— ——,
Collector,

*——district of——.

Receipted for—— —, 187—.

This list should never be folded; when transmitted by mail it should be rolled, not folded.

* The collector will make the proper entries in these blank spaces before forwarding the list to the Commissioner.

[Ed. 3-25-'79—6,000.]

INSTRUCTIONS TO COLLECTORS RELATIVE TO FORM 23 AND FORM 58.

On or before the 10th day of each month the collector will prepare a list on Forms 23 and 58, each in triplicate, for the entire district for the preceding month. The list on Supplemental Form 23 will not be required hereafter. The spirits stamps, other than tax-paid, will be paid for to the collector or deputy collector upon delivery to the parties who use them or for whom they are used. In case any stamps used during a given month are not paid for during the month, the collector will enforce payment in the following manner: He will demand payment from the distiller when the entry for deposit is made, and from the rectifier when the return on Form 45 is filed; and in case of neglect or refusal to pay for the stamps used (warehouse stamps or rectifier's stamps, as the case may be), he will report the delinquents for assessment on Form 23.

The entries on the lists will be made in accordance with the following instructions:

The collector will enter the amounts returned to him on Form 24 by his deputies; the amounts certified to him by the commissioner on Forms A and C; the amounts returned by tax-payers directly to himself, and all other taxes liable to assessment under the internal-revenue laws. In each case every fact necessary to enable the commissioner to assess and return the amounts to be collected should be specified in the proper columns, including column 7, of remarks. Each triplicate list will be a counterpart of the other two, except that the collector will mark across the top of one, in red ink, the word "Original," across the top of another the word "Duplicate," and across the top of the third the word "Triplicate." Form 23 should be made out alphabetically, without regard to article, occupation, or divisions. At the end of the list of names commencing with any given letter one line should be left blank, and in case the list is a large one two or three lines should be left blank.

Before sending the list to the Commissioner, the collector will make the entries on Form 23 in columns 2, 3, 4, 5, 6, and 7, and, in case a special tax is paid before the list is sent, in 12, 13, and 15, as follows:

1. Care should be taken that entries made on any one line of the original should be made on the corresponding line of the duplicate and triplicate.
2. The collector will enter in column 2 the names of all persons in his district liable to assessment, including those who have not paid for the spirits stamps chargeable at ten cents each, and those liable to the penalty of fifty per cent. for neglect to make return in due time, or of one hundred per cent. for making a false or fraudulent return (Form 11 of special-tax payers, Form 67 of banks or bankers, Form 106 of savings banks, &c.). In making up the list for May, he will enter the names of all persons who in May continue or commence a business rendering them liable to a special tax, and who have failed to pay the tax prior to June 1st. This must be done even when the tax is paid before the list is made up. And he will report every special-tax payer on the list for the month in which he commences business who fails to pay his tax prior to the first day of the succeeding month. In making up his lists for May and November of each year the collector will enter in column 2 of 23 A or 23 B the names of all banks and bankers in his district liable to assessments on circulation, and on 23 C or 23 D the names of all banks and bankers, with particulars, as directed on Form 23 C.
3. In giving the post-office address it is not necessary to state the county or township, but merely the post-office as found in the post-office directory, except in case the collection district is entirely comprised within the limits of a city, when the street and number will be given in lieu of the post-office address.
4. The article or occupation should be stated in full in column 4 when there is room. If there is not room the following abbreviations may be used, viz: "D." for dealer, "R." for retail, "L." for liquor, "W." for wholesale, "T." or "Tob." for tobacco, "Manuf." for manufacturer, "M." or "M'f'd'," for manufactured, "L. T." for leaf tobacco, "M. L." for malt liquors, "M. T." for manufactured tobacco, "Brewer, (or rectifier,) less than 500 bbls." for brewer (or rectifier) manufacturing (or rectifying) less than 500 barrels per year, "Brewer, (or rectifier,) 500 bbls. or more." for brewer (or rectifier) manufacturing (or rectifying) 500 barrels or more per year. In case spirits stamps other than tax-paid stamps are reported, the number and kind will be stated, as "5 warehouse stamps," or "7 rectifier's stamps," as the case may be. Only one kind of stamp should be reported on one line. In the case of banks, assessments on capital and deposits will be reported on Forms 23 C and 23 D, the amount due on capital being entered in column No. 7 and the amount due on deposits in column No. 8.

When an assessment is reported against a distiller on account of deficiency of spirits or excess of material in the production of distilled spirits, the words "Deficiency, Spirits," or "Excess, Spirits Material," as the case may be, will be entered. When an assessment is reported against a distiller, brewer, manufacturer of tobacco, snuff, or cigars, or other manufacturer, for having removed any taxable articles from his distillery, brewery, or manufactory, as the case may be, without the use of the proper stamp, or for not having duly paid such tax by stamp at the time and in the manner provided by law, the entry in this column should be "Stamp Tax Spts.," "Stamp Tax Tob.," "Stamp Tax Cigars," "Stamp Tax Beer," "Stamp Tax Medicine," "Stamp Tax Perfumery," as the case may be. The initials "S. T." may be used as an abbreviation for "Stamp Tax." When under section 5, act of March 1, 1879, the tax and interest on one or more packages of spirits in a distillery warehouse from which there has been an excessive loss is reported, the entry in this column will be "Gallon Tax Spirits."

5. In making entries in column 5 against the names of special-tax payers, the number of months for which the tax is due and the end of the special-tax year should in all cases be stated in the following manner: "5 mo. end'g Apr. 30, 1878," "12 mo. end'g Apr. 30, 1878," or as the case may be. In case of deficiency of spirits or excess of material in production of distilled spirits, the month or period during which the deficiency or excess occurred should be stated. In making entries in column 4 of Forms 23 C and 23 D against the names of banks and bankers, the full period for which the return on Form 67, Form 106a, or Form 106b is rendered should be stated as follows: "6 mo. end'g May 31, 1877," "6 mo. end'g Nov. 30, 1877," or otherwise, as the case may be.
6. The amount reported by the collector in column 6 should be the amount of the tax to be assessed. It is not necessary for the collector to state the amount of the fifty per cent. or one hundred per cent. penalty in this column. In case the tax so reported is paid prior to sending forward the list, the following entries should also be made on the list by the collector before the list is forwarded to the Commissioner, viz: The amount paid, including penalty, if any has been paid, in column 12; date of payment in column 13; and, if a special-tax stamp has been issued, the serial number of the stamp in column 15.
7. In the case of special taxes, the collector will state in column 7, of remarks, whether the return on Form 11, has been made, and, if made, the date when received, and whether true or false. As a penalty will be assessed in every case where a return on Form 11 is not made according to law, or the return is false or fraudulent, the necessity of making entry of these facts in each case is apparent.

When the tax on brandy distilled from apples, grapes, or peaches, exclusively, is reported for assessment for default in the payment thereof (see page 93, Regulations, Series 7, No. 7, and Circular No. 195,) the words "Stamp Tax Spts," will be entered in column No. 4, and the words "Fruit Brandy" in column No. 7.

When the tax and interest on spirits which have remained in a distillery warehouse more than three years is reported for assessment, or when the tax and interest on any cask or package in a distillery warehouse from which there has been an excessive loss of spirits (see section 5, act of March 1, 1879) is so reported, the serial number of the packages containing the spirits should be stated in column No. 7, or at the foot of the page under the heading "Additional Remarks by Collector." Interest under joint resolution of March 28, 1878, will be assessed with the tax.

Letters containing explanations concerning items reported for assessment should be inclosed with the list on which the items are reported, and reference should be made to such letters in column 7; otherwise the explanations will not be received until after the list is made up and the "Original" forwarded to the collector.

In reporting taxes the assessment of which is barred by the statute of limitation, the collector will obtain the necessary waiver on the return (see Circular Letter No. 4), forward the return with the list to the Commissioner, and report the fact in column 7.

The three copies of Form 23 and Form 58, prepared as above stated, will be disposed of as follows: Two copies, the "Original" and "Duplicate," will, on or before the 10th day of the month, be sent to the Commissioner, and one copy, the "Triplicate," filed in the office of the collector. In case the calculation of the deficiency taxes will, in any month, delay the transmission of Form 23 to the Commissioner beyond the 10th day of the month in which it should be sent, the collector will report the amount which he finds to be due on his last monthly list. He must not accept without question the amounts certified to him on Form A, nor, when he has the proper data for calculating such assessments, should he await the arrival of Form A before making such calculation. In case no assessment is to be made the collector will send but one copy of Form 23 and Form 58, and will write over his signature, in red ink, "I have no assessments to recommend for the month of ——, 187."

Collectors are earnestly requested to comply with the above instructions in the preparation of their assessment lists.

No list prepared by a collector will cover a less period than one calendar month. The last list prepared by an outgoing collector will be for the last full month of his term of office; and the first list of the incoming collector will be for the full calendar month during which he enters upon the duties of his office. The outgoing collector will certify to the new collector the assessments, advance collections, and amounts to be reported on Form 58 for those days of the month in which he remained in office. And the new collector may take credit on his first report on Form 31, for the advance collections made by his predecessor.

The Commissioner will, immediately on the receipt of the lists on Forms 23 from the collector, inquire, determine, assess, and enter in columns 8, 9, 10, and 16 of Forms 23 A and 23 B, and in columns 8, 10, 11, and 12 of Forms 23 C and 23 D, the amounts ascertained to be assessable, including the amounts returned by the collector, if found correct. He will also enter at the foot of the list the amount assessed on Forms 23 C and 23 D and the amount reported by the collector on Form 58. The value of the spirits stamps other than tax-paid stamps at 10 cents each will be entered in column 16. In the case of special taxes, if the serial number of the stamp is not reported, the tax will be entered in column 8 and included in the amount to be receipted for on Form 23½. Amounts entered in column 16 will not be included in such receipt.

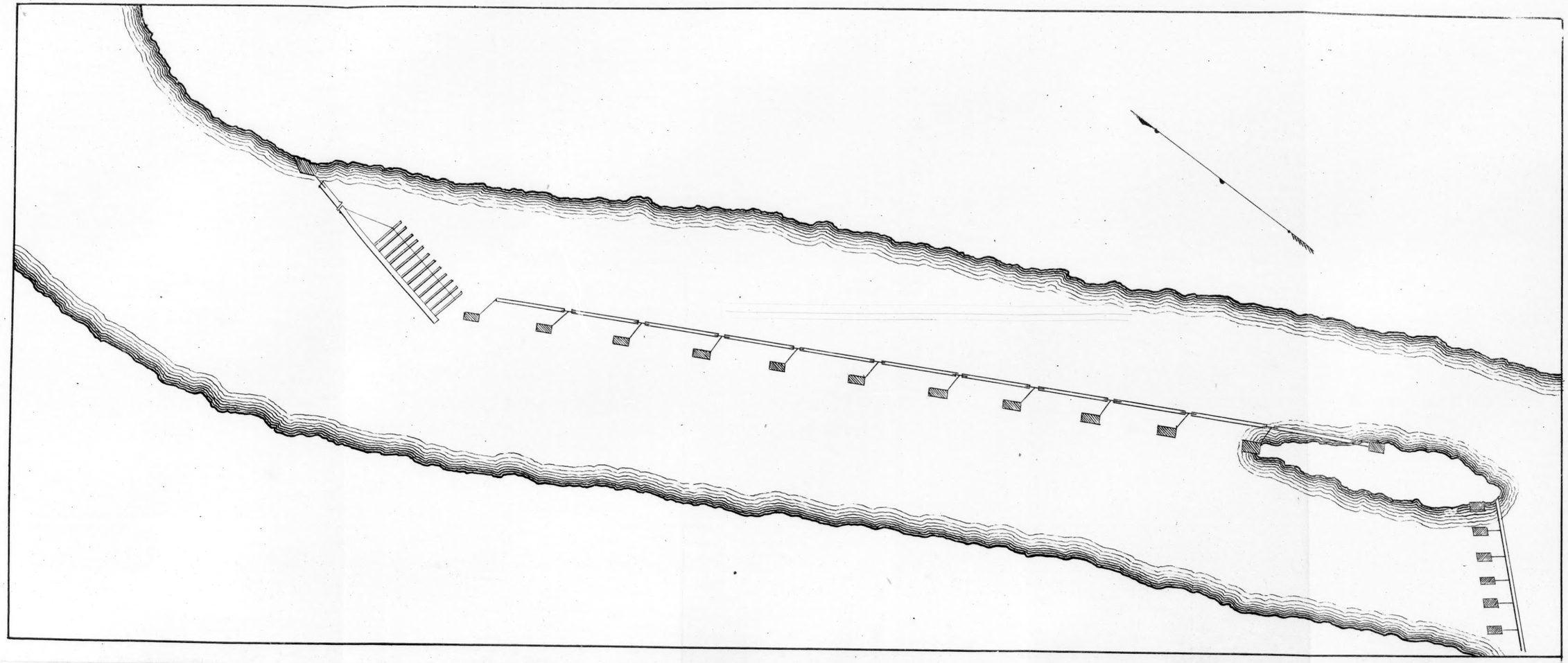
The list will then be sent to the collector, who will, on receiving and critically examining the same, receipt therefor on Form 23½, the original of which receipt will be sent to the Commissioner of Internal Revenue, the duplicate to the First Comptroller of the Treasury, and the triplicate will be securely attached to the copy of the list on Form 23 filed in the collector's office. The amount of this receipt will be taken up on Forms 31 and 79 in the same manner as was the case with receipts formerly given to the assessor on Form 23½. It is greatly to be desired that the number of receipts on Form 23½ be limited to twelve in each year, or one for each month, and care should be exercised to have each list on Form 23 as complete as possible when sent to the Commissioner; but any tax inadvertently omitted should be included in the list for the next month, with a note in column 7 briefly explaining the cause of delay. Failure to include in the next list any such amount will be deemed a gross neglect of duty by the collector so omitting the same. If the list for any given month transmitted to the collector is incomplete by reason of the assessment against any person or firm being too small, or by reason of an omission to make an assessment recommended in column 6, the name of the person against whom the collector desires the assessment to be made, with the proper amount stated in column 6, will be returned by him on the list for the following month.

If the collector inadvertently neglects to report an amount for assessment for any given month, the error will usually be remedied by reporting the amount on the list for the succeeding month. If, however, a month's delay would render the assessment invalid by reason of the 15 months' limitation, the collector will return the list and triplicate receipts for the month for which the assessment should be made, and the assessment will be made on the list so returned. In case the collector thinks that the amount certified to him on Form 24 is incorrect by reason of an erroneous assessment, he will not state another amount in his receipt but will sign the receipt as certified, unless there should be an error in the footing up. In the latter case the collector should at once return the unsigned receipt with a statement showing the page and column in which the error is to be found, when, if the facts warrant, new triplicate receipts will be prepared showing the correct amount to be receipted for.

Erroneous assessments will be adjusted in the following manner: If too large, by claim for abatement; if the assessment is too small, or an amount is omitted which should be included, the deficiency or amount omitted should be reported for assessment on the next succeeding list.

Collectors are specially cautioned against leaving their deputies with too small a supply of Form 24, against making entries in columns 8, 9, 10, 16, and 17 of Forms 23, and against confounding the monthly return on Form 23 with those made on Forms 31, 22, and 49.

On the list being returned by the Commissioner the collector will collect the amounts due, and fill up in ink, at the time of payment, columns 11, 12, and 13. On payment of special tax, or other tax paid by a stamp, the collector will give only the special-tax stamp (or other stamp required) as receipt for the amount stated in column 8, and a special receipt only for the amount stated in column 9. In other cases he will give a special receipt for the amount stated in column 10. After giving the special-tax stamp the collector will enter the serial number thereof in column 15. When taxes are abated the collector will enter the amount abated in column 12, the date of abatement in column 13, and the number of the abatement order in column 14.



PLAN

OF

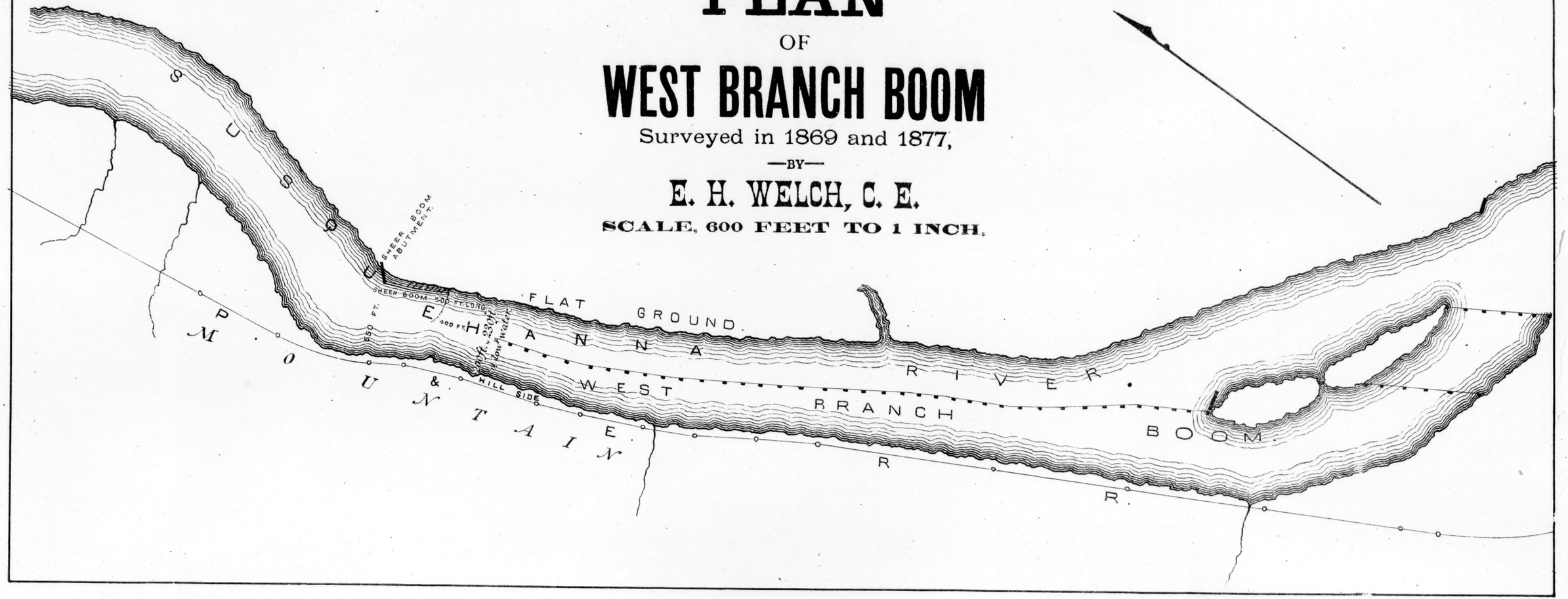
WEST BRANCH BOOM

Surveyed in 1869 and 1877,

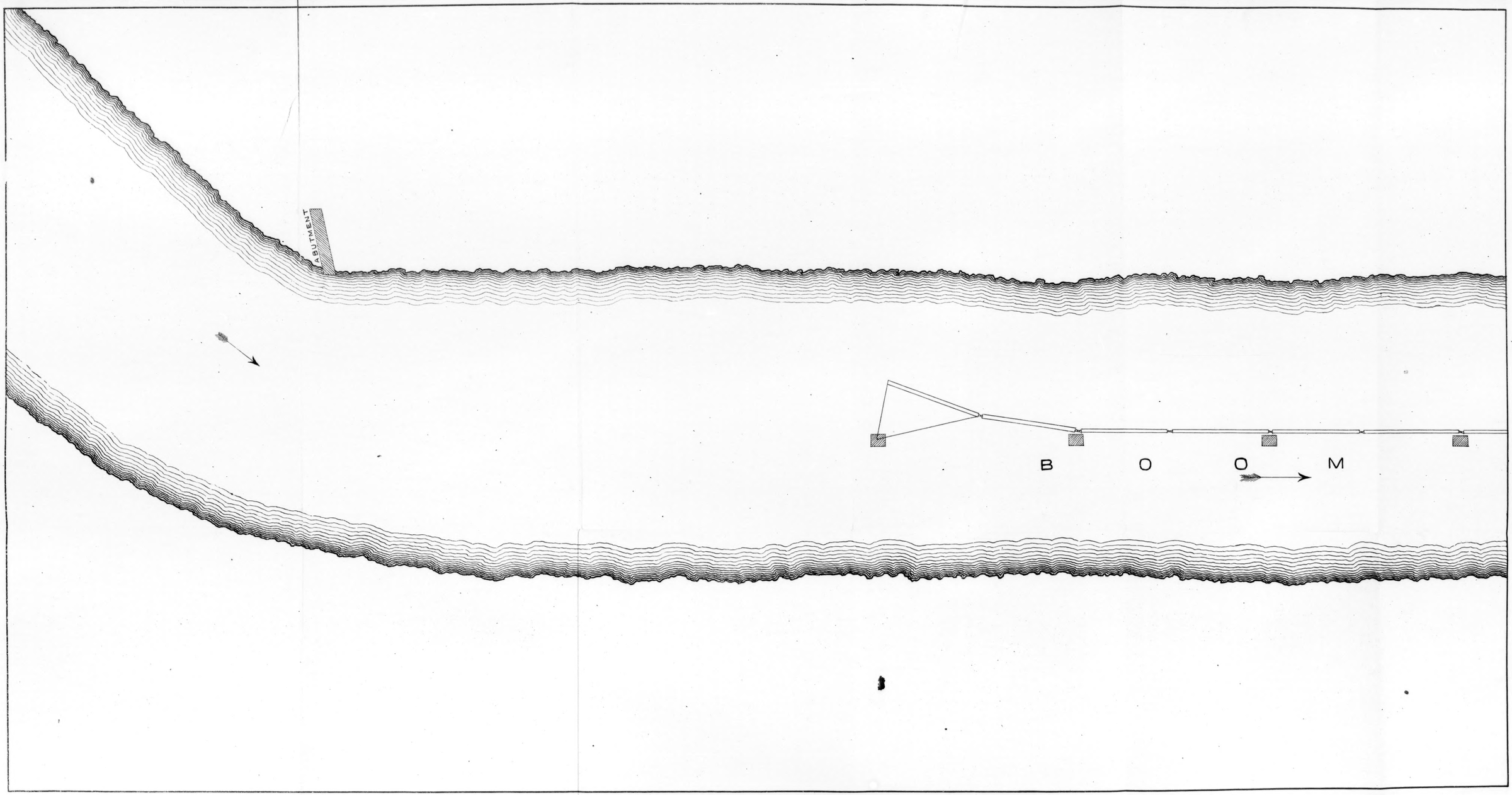
—BY—

E. H. WELCH, C. E.

SCALE, 600 FEET TO 1 INCH.



NORTH SHORE
ABUTMENT EXTENDED ABOUT 100 FEET FROM THE NORTH SHORE
ROPE TO NORTH SHORE
HEAVY CABLE
SIDE USED AS BOOM SHEER
SIDE BOOM
CABLE
HINGE
PIER
WIND-LASS
PIER AT HEAD OF BOOM WITH WINDLASS.
BOOM
SOUTH SHORE


ABUTMENT
B O O M